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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

UNITED STATES OF AMERICA, - - Respondent

versus

EDGAR JONES,
GERMAN STUMBO,
KENNETH ROWLAND,
TEDDY KINNEY and
MOSE MEADE - - - - - - - - Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a court-ordered seating arrangement at trial which requires a criminal defendant to sit far away from his attorney, making direct verbal communication impossible, deprive the defendant of effective assistance of counsel?

2. Should this Court allow federal prosecutors to compromise the grand jury's independence by appointing their chief investigative agent, primary witness and assistant to serve as an "agent of the grand jury"?

3. Should this Court reaffirm and clarify its decision in *United States* v. *Enmons*, 410 U. S. 396 (1973) by insisting that trial courts accurately and clearly instruct juries that violence associated with the pursuit of legitimate labor objectives is exempt from Hobbs Act prosecution?

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Authorities iii

Table of Contents of Appendix iv

Opinion Below 1

Statement of Jurisdictional Grounds 1– 2

Constitutional Provisions and Statutes Involved 2– 3

Statement of the Case 4–10

Argument 10–26

I. The Decision Below That the Petitioners Have No Sixth Amendment Right to be Seated in Such a Way That They Could Communicate Directly With Their Attorneys During Trial Is Contrary to Fundamental Concepts of Effective Representation and in Direct Conflict With Other State and Federal Appellate Decisions. 10–18

II. The Widespread Practice of Cloaking Government Agents With the Unauthorized Office of "Grand Jury Agent" Is So Repugnant to the Integrity of the Grand Jury That its Condemnation by This Court Is Needed to Preserve That Body's Independence. 18–21

III. Review of the Trial Court's Labor Exemption Instruction Is Urgently Needed to Halt the Continuing Erosion by Federal Appellate Court Decisions of This Court's Holding in *United States* v. *Enmons*. 21–26

Conclusion 26–27

TABLE OF AUTHORITIES

Cases: PAGE

Geders v. *United States*, 425 U. S. 80 (1976) 10, 15, 16
People v. *Zammora*, 152 P. 2d 180 (Cal. Dist. Ct. App. 1944) 14
United States v. *Allen*, 542 F. 2d 630 (4th Cir. 1976) 15, 16
United States v. *Anderson*, 577 F. Supp. 223 (D. Wyo. 1983) 19, 20
United States v. *Bryant*, 545 F. 2d 1035 (6th Cir. 1976) 15
United States v. *Cosby*, 601 F. 2d 754, 757-58 and n.6 (5th Cir. 1979) 19
United States v. *Dionisio*, 410 U. S. 1 (1973) 20–21
United States v. *Enmons*, 410 U. S. 396 (1973) ...6, 9, 21, 22, 23, 24, 25, 26
United States v. *Kilpatrick*, 594 F. Supp. 1324 (D. Colo. 1984) 19, 20
United States v. *Kilpatrick*, 575 F. Supp. 325 (D. Colo. 1983) 19, 20
United States v. *Sorrentino*, 726 F. 2d 876 (1st Cir. 1984) 14
United States v. *Turkette*, 656 F. 2d 5, 10 (1st Cir. 1981) 11
United States v. *Walker*, 677 F. 2d 1014, 1016 n.3 (6th Cir. 1982) 26
WSB Electric v. *Rank & File Com. to Stop 2-Gate Sys.*, 105 F.R.D. 417, 419 (D. Mass. 1984) 24

Constitutional Provisions:

Sixth Amendment 2

Statutes:

18 U.S.C. 844(i) 4
18 U.S.C. 1951 ..... 2– 3
28 U.S.C. 1254(i) 2

Rules of the Court:

Rule 6(e), Federal Rules of Criminal Procedure .. 8, 20
Rule 17, Rules of Supreme Court 11
Rule 20, Rules of Supreme Court 2

TABLE OF CONTENTS OF APPENDIX

PAGE

Appendix A — Opinion and Order of the United States Court of Appeals for the Sixth Circuit (July 11, 1985) 1a–22a

Appendix B — Judgments and Probation/Commitment Orders of United States District Court for the Eastern District of Kentucky (May 25, 1984) as amended by Order dated May 30, 1985 .....23a–30a

Appendix C — Excerpts from Voir Dire of jury panel and trial before Judge, G. Wix Unthank, United States District Court for the Eastern District of Kentucky (January 23, 24, and 25, 1984) 31a–50a

Appendix D — Diagram of seating arrangement at trial 51a–53a

Appendix E — Excerpts from testimony of Dennis L. McAllister before Judge, G. Wix Unthank, United States District Court for the Eastern District of Kentucky (February 7, 1984) 55a–60a

Appendix F — Excerpts from Court's instruction to jury by Judge, G. Wix Unthank, United States District Court for the Eastern District of Kentucky (April 6, 1984) 61a–68a

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-_____

UNITED STATES OF AMERICA - - *Respondent*

v.

EDGAR JONES,
GERMAN STUMBO,
KENNETH ROWLAND,
TEDDY KINNEY and
MOSE MEADE - - - - - *Petitioners*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the Opinion and Order of the United States Court of Appeals for the Sixth Circuit entered on July 11, 1985.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, review of which is hereby sought, appears as *United States* v. *Edgar Jones, et al.,* in 766 F. 2d 994 and is set forth in its entirety as Appendix A to this Petition.

STATEMENT OF JURISDICTIONAL GROUNDS

The Opinion, Order and Mandate of the United States Court of Appeals for the Sixth Circuit, review of which is hereby sought, were entered on July 11,

1985. 28 U.S.C. §1254(i) is believed to confer jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit. This Petition is being submitted for filing within sixty (60) days from the date of entry of the Opinion, Order and Mandate in accordance with Rule 20 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment VI to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.* (Emphasis added).

18 U.S.C. §1951 provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section

shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT OF THE CASE

This case arises from acts of violence committed against Ray-Mac Coal Company, an Eastern Kentucky mining concern, (hereinafter referred to as "Ray-Mac") during a labor dispute in February, 1982. The Petitioners, Edgar Jones and German Stumbo, are coal operators from Floyd County, Kentucky. The Petitioners, Teddy Kinney, Mose Meade and Kenneth Rowland, are coal miners, also from Floyd County, Kentucky. Teddy Kinney was president of Local 5967 of the United Mine Workers of America (hereinafter referred to as UMWA).

On June 6, 1983, a federal grand jury for the Eastern District of Kentucky at Pikeville returned a ten-count indictment charging the Petitioners and 15 other defendants with various violations of 18 U.S.C. §1951 (hereinafter referred to as the "Hobbs Act") and certain explosives and firearm statutes. All of the Petitioners, save German Stumbo, were acquitted of all non-Hobbs Act counts, but were convicted of conspiring to violate and violating the Hobbs Act. Specifically, Stumbo, Meade, Kinney, Rowland and Jones were convicted of conspiring to violate the Hobbs Act as charged in Count I of the Indictment. Stumbo, Meade, Kinney and Rowland were also convicted of violating the Hobbs Act, which violation Jones was convicted of aiding and abetting. Meade was convicted of an additional Hobbs Act count for burning a coal tipple leased by Coal-Mac, another Floyd County mining company. Stumbo was convicted of a separate count under 18 U.S.C. §844(i), arising out of the de-

struction of Ray-Mac mining equipment by explosives. Each Petitioner is currently serving a three year sentence. Appendix B. Meade and Stumbo will be placed on probation for two years when they are released. Appendix B, pp. 26a, 27a, 30a.

The events which gave rise to this case began on February 13, 1982 at a union meeting of the members of UMWA Local 5967. Testimony, disputed by the Government, established that the members discussed and voted upon a proposal to picket Ray-Mac, which had recently started operating with non-union employees in an area that had long been a union stronghold in Floyd County, Kentucky.

On February 15, 1982, picketing began at the Ray-Mac site, ending in an unsuccessful attempt to persuade Ray-Mac employees and truckers to join the Union. The picketing continued through the next two days, escalating into the shooting of firearms by both pickets and Ray-Mac employees. Although some equipment was damaged, most of the shooting was into the air and nobody was seriously injured.

The other acts of violence alleged against the Petitioners included the destruction and attempted destruction of a Ray-Mac coal auger and bulldozer, respectively, with two homemade bombs constructed of an innertube and a basketball containing dynamite on February 21, 1982. Approximately one week later, the old wooden coal tipple leased by Coal-Mac was burned.

Although details concerning the Petitioners' participation were unclear and disputed, the fact of the events set out above and the general involvement of

Stumbo, Meade, Rowland and Kinney in them was not seriously contested. Any link between these activities and Edgar Jones, however, was vigorously disputed. The Petitioners' chief defense at trial was that the activities of February, 1982 were pursued to achieve the legitimate labor goal of organizing Ray-Mac's employees and were thus exempt from Hobbs Act prosecution under the holding in *United States* v. *Enmons,* 410 U. S. 396. The Government's theory, on the other hand, was that the Petitioners and their co-defendants had conspired to engage in these activities at the direction and for the benefit of Edgar Jones with the purpose of destroying Ray-Mac's ability to compete with Jones' company, JRM Mining. The Government argued that Edgar Jones planned, initiated, financed and directed these activities in an attempt to force Ray-Mac out of business through acts of violence, although Jones was never alleged to have physically participated in those acts.

Throughout the course of the trial, Edgar Jones and the other Defendants asserted that the activities at Ray-Mac in February, 1982 occurred in the course of a legitimate effort by Local 5967 to organize a non-union coal company and merely resulted from efforts to achieve a legitimate union objective. Furthermore, the defense argued that the picketing and other acts at the Ray-Mac site were not part of a conspiracy to assist Edgar Jones in shutting down his alleged competitor, but rather a futile, desperate effort by union members and sympathizers to organize Ray-Mac and

preserve the prominence of the UMWA in the coal fields of Eastern Kentucky.

A. Seating Arrangement.

Trial of the case ultimately involved 18 defendants represented by 12 attorneys. A one-week mini-hearing to determine the existence of a conspiracy for admission of co-conspirators' statements was conducted through the week of November 14, 1983. Trial by jury began on January 9, 1984 and lasted for three months. At the mini-hearing, the Defendants, due to their large numbers were ordered to sit in the back of the courtroom, far away from counsel. During voir dire, the Defendants were required to sit together in one corner of the courtroom, placing the Petitioners between 15 to 30 feet from their attorneys. At trial, the court-ordered seating arrangement placed the Defendants hemmed in against the wall in a "peanut gallery" arrangement. All of the Petitioners were placed a considerable distance from their attorneys. Appendix C, D.

These conditions made direct communication between attorney and client impossible during the mini-hearing, voir dire and trial. The court overruled defense objections to the seating arrangements and dismissed suggestions which would have, with some minor rearrangement of chairs or addition of tables, allowed the Defendants to sit next to or directly behind counsel. The court seemed to believe that any rearrangement would somehow upset the decorum of the courtroom. If the attorneys wished to communicate

with their clients, they were required to stand up, leave their places and walk to their client. If the Defendants wished to communicate with their attorneys, they were required to pass notes, assuming they could read and write. Appendix C, D.

B. Grand Jury Agent.

One of the prosecution's chief witnesses at trial was Dennis L. McAllister, an investigative agent for the Treasury Department, Bureau of Alcohol, Tobacco and Firearms. McAllister was the chief investigative agent responsible for investigating and preparing the case for trial. He was also a chief witness before the grand jury. In addition, he served as the prosecutor's assistant during grand jury proceedings, purportedly under the authority of Rule 6(e) of the Federal Rules of Criminal Procedure.

In addition to all these functions and while continuing his investigation, McAllister was also somehow designated and sworn in as an "agent of the grand jury" at the request of the prosecutor. Appendix E. As "grand jury agent" McAllister was responsible for reporting the results of his investigation to the grand jury, serving and compelling compliance with grand jury subpoenas, keeping and examining grand jury documents and otherwise assisting the grand jury in every way. Neither McAllister nor the prosecution was able to cite any legal authority for the investigator's status as "agent of the grand jury". Appendix E, pp. 59a-60a. The Petitioners strongly objected to the procedure of swearing and designating McAllister as a

"grand jury agent" on the grounds that it completely compromised the grand jury's independence, making it a mere tool of the prosecutor. Defense motions to strike all of McAllister's testimony and to dismiss the indictment on the grounds of prosecutorial misconduct before the grand jury were summarily overruled.

C. Labor Activities Exemption Instruction.

The Petitioners' chief defense at trial was based on the exemption from Hobbs Act prosecution of acts undertaken in pursuit of legitimate labor goals recognized in *United States* v. *Enmons,* 410 U. S. 396. The Petitioners and the Government each submitted different proposed *Enmons* instructions, as did most of the other Defendants. The lower court rejected all proposed instructions and chose instead to formulate its own charge on the labor exemption defense. Appendix F. Defense counsel objected to the court's instruction as a plain misstatement of the holding of *Enmons* which practically directed a verdict against them. Even the Government itself practically implored the court to change its instruction to conform with *Enmons,* no doubt sensing that reversible error was about to be committed. The court refused to make any suggested modification and gave its labor exemption instruction virtually unchanged.

The Petitioners appealed from their convictions to the United States Court of Appeals for the Sixth Circuit on June 18, 1984. In an opinion rendered on July 11, 1985, that court affirmed the convictions. Appendix A. In doing so, the Court of Appeals held that the

integrity of the grand jury process was not compromised by cloaking the chief investigative agent with the mantle of an "agent of the grand jury". Appendix A, p. 14a. The Court of Appeals also held that the Petitioners received effective assistance of counsel despite the fact that they were seated in such a way that they could not directly communicate with their attorneys during trial and pre-trial proceedings. Appendix A, p. 20a. Finally, although acknowledging that part of the trial court's *Enmons* instruction was "somewhat confusing" the court approved the instruction as being a proper statement of the labor activities exemption when "viewed as a whole." Appendix A, p. 19a. The Petitioners seek a writ of certiorari to review these decisions of the Court of Appeals.

ARGUMENT

I. The Decision Below That The Petitioners Have No Sixth Amendment Right to be Seated in Such a Way That They Could Communicate Directly With Their Attorneys During Trial is Contrary to Fundamental Concepts of Effective Representation and in Direct Conflict With Other State and Federal Appellate Decisions.

The right of a criminal defendant to free and unhampered consultation with his attorney during trial has been recognized by this Court as fundamental. *Geders* v. *United States,* 425 U. S. 80 (1976). This Court, however, has never directly addressed the question of whether effective representation includes the simple, basic right of a defendant to sit close enough to his attorney at trial to exercise this right of consultation. The growing prevalence of mass federal con-

spiracy trials involving numerous defendants ensures that this issue will arise again and again. This Court's guidance is urgently needed to ensure that trial courts, in experimenting with the various methods of seating numerous defendants and attorneys, do not ignore, overlook or ride roughshod over the fundamental right to effective consultation. The fact that the decision of the court below directly conflicts with the only state and recent federal decisions discussing the subject further compels a grant of certiorari on this issue. See United States Supreme Court Rule 17.

This case does not involve a situation where practical necessities or security reasons required attorney and client to be separated. *Cf. United States* v. *Turkette,* 656 F. 2d 5, 10 (1st Cir. 1981). There was ample space in the courtroom. Appendix C, p. 42a. No compelling need for isolating the Defendants from their lawyers appears in the record and no justification for this action was given by the court. Nevertheless, the court insisted that the Defendants be seated at trial in a two-row "peanut gallery".

Defense counsel were seated at an "L" shaped table. The court-ordered seating arrangement required that the Appellants be seated at trial in a double row behind a portion of the counsel table so that they were bunched together and always a considerable distance from their attorneys. The situation at trial is approximately represented by the diagram appended hereto as Appendix D.

During voir dire the distance between the Defendants and their attorneys was even greater since the

Defendants were all crowded into one corner, totally away from their counsel. Counsel for Stumbo, Kinney and Rowland estimated that he was 15 to 17 feet from his nearest client during voir dire. Appendix C, p. 34a. The situation was even worse during a week-long pretrial conspiracy mini-hearing, where the Defendants were seated at the back of the courtroom. Even at the best of times, direct verbal communication between the Appellants and defense counsel was precluded by the distance involved. In sum, the seating arrangement made meaningful consultation between client and attorney during the mini-hearing, voir dire and trial impossible.

Defense counsel objected to the court's seating arrangement on the grounds that it deprived their clients of the right to freely communicate with their attorneys during trial and consequently denied them the effective assistance of counsel. Appendix C, pp. 34a-45a. Counsel pointed out that it would be impossible for the Defendants to comment on testimony for cross-examination purposes, propose questions and otherwise participate in their defense if there were no means of direct contact between attorney and client. The trial court's proposed "solution" was to give each Defendant a pad and pen to write notes to their counsel, despite the fact that some Defendants could barely write and one was illiterate. Appendix C, pp. 42a-43a. As counsel pointed out, in the several minutes that could pass before a note reached the respective attorney, crucial testimony could have gone by or important

jury selection facts or criteria could have been overlooked. Appendix C, pp. 43a-44a.

In one instance, a prospective juror made a statement that seemed significant to one of the Petitioner's counsel. When counsel looked back to gesture toward his clients to get their response or impression, he had to struggle to even see them. When counsel did get their attention, he tried unsuccessfully to mouth the problem to them. If counsel had written a note, the Petitioners, when they finally got it, may not have understood the problem, requiring further hand gestures and mouthing. In any event, the delay in communication was tantamount to no communication at all. One Defendant summed up his feelings about the seating arrangement by commenting in a written note "If I can't sit close to my lawyer, why do I need a lawyer?". Appendix C, pp. 44a-45a.

These problems persisted through the three-month trial. The only time the Defendants could effectively consult with their attorneys was during recesses, which were often very short. The court rejected defense proposals which, with some minor rearrangements, would have easily allowed the Defendants to sit either beside or directly behind their attorneys. Appendix C, pp. 49a-50a. The trial judge seemed concerned that any arrangement other than the one he had ordered would somehow upset the decorum and balance of the courtroom. The trial judge also stated that he was concerned that talking between the defendant and his attorney would be distracting to the jury. Appendix C, p. 41a. This unfounded fear of "jury distraction" had the

effect of distracting the Petitioners and their counsel from their essential roles.

The court in *People* v. *Zammora,* 152 P. 2d 180 (Cal. Dist. Ct. App. 1944) was faced with a nearly identical situation in which 22 defendants were tried together. The limited courtroom facilities did not permit the defendants to sit at counsel table with their respective attorneys, although defense counsel vigorously insisted that they had the right to do so. The defendants were not permitted to move about to consult with their attorneys, but could consult during recesses with the court's permission. *Id.* at 214. The trial court overruled all objections to the seating arrangement, stating that everything possible had been done to allow consultation without excessive disruption of courtroom decorum. The California appellate court reversed and remanded for a new trial, holding that at trial:

> In order that he may have absolute freedom to assist by suggestion and information in his own defense, the accused has the right to sit with his counsel, or at least be so situated that he can freely and uninterruptedly communicate and consult with his attorney. It is the court's duty to provide adequate quarters and facilities, which the court has the power to do without limitation.

Zammora appears to be the only state court decision which discusses the issue. The constitutional right of a criminal defendant to sit with his attorney, absent security or practical reasons compelling otherwise, was also recently recognized in *United States* v. *Sorrentino,* 726 F. 2d 876 (1st Cir. 1984). The Opinion of the

Sixth Circuit below is in conflict with these decisions in failing to recognize this right.

In *Geders* v. *United States,* 425 U. S. 80 (1976) this court held that the trial court committed reversible error by ordering that Geders not consult with his attorney during an overnight recess between his direct and cross-examination testimony. The *Geders* holding has been applied to reverse convictions for similar limitations on the right of consultation during a one-hour noon recess, *United States* v. *Bryant,* 545 F. 2d 1035 (6th Cir. 1976) and even a twenty-minute recess. *United States* v. *Allen,* 542 F. 2d 630 (4th Cir. 1976), *cert. denied,* 430 U. S. 908 (1977). The *Allen* court stated that the sixth amendment right to counsel was "so fundamental that there should never occur any interference with it for any length of time, however brief, absent some compelling reason." *Id.* at 633.

The situation below was the converse of that requiring reversal in *Geders* and its progeny and certainly no less violative of the Appellants' sixth amendment rights. The Appellants were free to consult with their attorney during recesses, but were effectively barred by the court-ordered seating arrangement from communicating with counsel during actual voir dire and trial proceedings. The court was unclear as to its reasoning in ordering the seating arrangement, giving no better justification other than its own peculiar notions of courtroom decorum. This rationale is difficult to comprehend in light of the Petitioners' fundamental right to consult with counsel at every stage of the proceedings. This right could have been preserved with

extreme ease by simply switching the chairs around so a client could sit next to or directly behind his counsel or by simply adding more tables. In *Geders, Allen* and *Bryant,* the Courts found the right to consult with counsel to be so fundamental that actual prejudice need not be shown to warrant reversal for an order interfering with that right. Nevertheless, the prejudice is obvious when a criminal defendant's right to communicate with his attorney is interfered with and impeded, not just for twenty minutes or one hour, but for every single day of a three-month trial. The prejudice in this case is well documented in the record. Appendix C.

In holding that no sixth amendment violation had occurred, the Court of Appeals for the Sixth Circuit focused on the fact that the Petitioners "were permitted to pass notes to their attorneys" and that "[t]he attorneys were permitted to get up and hold conversations with their clients." Appendix A, p. 20a. This holding demonstrates an alarming lack of understanding about the respective roles of attorney and client during a trial. Any attorney with a moderate amount of trial experience will acknowledge that instant and unhampered communication between client and attorney is essential to effective representation. For example, if a witness on cross-examination gives an answer that the client immediately sees is erroneous or inconsistent, the client must be able to communicate his observation without delay. Otherwise, the opportunity to formulate an adequate follow-up question will be lost.

Inability of counsel and client to communicate creates similar problems during direct examination,

voir dire and virtually every aspect of the trial. During the course of a long trial, the frustration of delays in and lack of communication will be compounded over and over with each lost opportunity. The delays caused by requiring counsel to interrupt what he is doing, discreetly get up, walk over to his client, discuss the matter causing immediate concern, walk back and resume, assuming that the client could quickly get his attorney's attention in the first place, is tantamount to no communication at all.

The Petitioners did not ask to be indicted and tried along with 15 other defendants. Once the decision to proceed with this mass prosecution was made, and all motions to sever overruled, it was the court's duty to ensure that courtroom facilities were adequate to safeguard the Petitioners' constitutional rights, which could have easily been done here. Certainly, the trial court's peculiar notions concerning courtroom decorum and balance should never override constitutionally guaranteed rights. The court's failure to discharge its duty to provide adequate seating arrangements profoundly interfered with the Petitioners' fundamental right to adequate consultation with their defense counsel. While actual prejudice need not be shown where basic sixth amendments rights are violated, the prejudice is obvious and well documented in the record where, for each day of a major three-month trial, the Petitioners were not able to meaningfully participate in their defense during trial procedures.

This case presents an opportunity for the Court to fashion a rule to prevent similar sixth amendment viola-

tions in the future. A rule should be established recognizing the sixth amendment right of a criminal defendant to be seated close enough to his attorney to ensure that free and unhampered consultation can occur. If security or other compelling practical considerations require that the Defendant be seated in another manner, the trial judge should be required to place those considerations in the record. For these reasons, the Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

II. The Widespread Practive of Cloaking Government Agents With the Unauthorized Office of "Grand Jury Agent" is So Repugnant to the Integrity of The Grand Jury That its Condemnation by This Court is Needed to Preserve That Body's Independence.

The issue of whether the prosecutor's chief investigator, primary witness and assistant may be made an "agent of the grand jury" is of critical importance, as it goes to the very core of the historical purpose and integrity of the grand jury. Even the court below recognized the "importance and novelty" of the issue in its opinion. Appendix A, p. 10a. The urgent need for review of the Sixth Circuit's stamp of imprimatur upon this prosecutor-created office is highlighted by the fact that such appointments have become "common practice" in federal grand jury proceedings. Appendix E, p. 59a.

The practice of appointing or swearing investigative agents as "agents of the grand jury" has been harshly condemned in recent opinions by federal judges as a flagrant assault upon the independence and

integrity of the grand jury. *United States* v. *Kilpatrick,* 594 F. Supp. 1324 (D. Colo. 1984); *United States* v. *Anderson,* 577 F. Supp. 223 (D. Wyo. 1983); *United States* v. *Kilpatrick,* 575 F. Supp. 325 (D. Colo. 1983). Serious questions concerning the practice were raised in *United States* v. *Cosby,* 601 F. 2d 754, 757-58 and n.6 (5th Cir. 1979). Oddly enough, the Sixth Circuit in its opinion below cited *Cosby* as giving "tacit approval" of the practice, Appendix A, p. 13a, even though the Fifth Circuit merely decided to express no opinion on the issue since it reversed on other grounds. It is extremely likely that other courts will be called upon to grapple with this common practice unless there is a definitive ruling from this Court.

No satisfactory explanation has ever been put forth as to why a grand jury would need an agent to be appointed to "assist" it or how an investigator can purport to be an agent of a supposedly independent, unbiased grand jury when, in fact, he is working for the prosecutor with the single-minded purpose of convincing that same grand jury to indict. From the day of his appointment, Dennis McAllister investigated, served subpoenas, gathered documents and testified not as an agent working for the ATF or an assistant working for the prosecutor, but, in his own eyes, in the eyes of the prosecutor and those of the grand jury, as a "grand jury agent". Obviously, despite his sworn designation as a grand jury agent, McAllister never ceased to view his job as prosecutorial. Once an investigator becomes so identified with the grand jury as its agent, the grand jury ceases its role as an inde-

pendent constitutional body designed to clear the innocent as well to indict the guilty. It becomes instead part of a "team effort" to secure an indictment in language suitable to the prosecution.

While no one doubts that the prosecutor needs assistance from investigators to do his job, there is a world of difference between assisting the prosecutor under Rule 6(e) and purporting to work for the grand jury as its agent. McAllister's only authority for even being in the grand jury room was either as the prosecutor's assistant or as a witness. The prosecutor and the grand jury can easily perform their separate functions without the dubious aid of a grand jury agent.

Despite the lack of a clear appellate case on the subject, the district courts in *Anderson* and *Kilpatrick* had no difficulty in discerning the clear and present danger of making an investigator an agent of the grand jury: by blurring the separate functions of investigator, prosecutor and grand jury, the jurors will be perceived, and perceive themselves, as merely an arm of the prosecution, not an independent body. Making the prosecutor's chief witness, assistant and investigator an agent of the grand jury is perhaps the final insult to the already much-eroded concept of an independent grand jury standing as a bulwark between the Government and private citizens.

The grand jury's historical and constitutional function is that of "an investigative body 'acting independently of either prosecuting attorney or judge', whose mission is to clear the innocent, no less than to bring to trial those who may be guilty." *United States*

v. *Dionisio,* 410 U. S. 1 (1973) (citations and footnotes omitted). This basic and sacrosanct constitutional purpose of the grand jury has, in recent years, been steadily eroded by practices which compromise the grand jury's independence and separate identity.

The grand jury can still perform the independent function it was created for, but only if courts are willing to protect its integrity from the incursions of overreaching prosecutors seeking to misuse it. The use of investigators as grand jury agents, if permitted by this Court, can only serve to hasten the complete disappearance of the last vestiges of grand jury independence. This Court can and should exercise its supervisory powers to put a halt to this widespread, unlawful and invidious practice

III. Review of The Trial Court's Labor Exemption Instruction is Urgently Needed to Halt the Continuing Erosion by Federal Appellate Court Decisions of This Court's Holding in *United States* v. *Enmons.*

The basic question presented by this case is: How must trial courts instruct juries regarding the labor activities defense to Hobbs Act prosecutions. In 1973, this Court held in *United States* v. *Enmons,* 410 U. S. 396 (1973) that the Hobbs Act did not reach the use of violence to achieve legitimate labor goals. This Court recognized that Congress never intended to include violence arising out of a legitimate labor dispute within the Act's definition of extortion, leaving such matters to state court prosecution. The central focus of *Enmons* which must always be kept in mind is that,

in the labor context, the means the defendant uses, no matter how wrongful or violent, are irrelevant as long as the labor goal is legitimate. It is this basic concept which the trial judge below either completely ignored or utterly misunderstood when he instructed the jury.

Since *Enmons* was decided, no federal court of appeals case has been published in which a Hobbs Act defendant has successfully availed himself of the labor activities defense. Instead, *Enmons* has been eroded, limited to its own facts, distinguished and "explained" away. See Appendix A, pp. 15a-16a and cases cited therein. The decision below, for example, came very close to holding that *Enmons* does not apply outside of the "collective bargaining" context or to any labor goal other than "higher wages." Appendix A, p. 17a.

The various limitations placed upon the *Enmons* rationale by federal appellate courts have made it difficult, if not impossible, for anyone to predict with assurance how this Court's holding is to be applied to any particular fact pattern. The result of this confusion was made evident in the trial court here. Trial judges, such as the one below, simply have no idea how to accurately and intelligibly instruct a jury on how the labor activities defense is to be applied. This case presents an ideal opportunity for this Court to clarify and reaffirm *Enmons* by rejecting the erroneous and misleading instructions given by the trial court.

The Opinion of the Sixth Circuit below is the only published decision discussing the correctness of an *Enmons* instruction in detail. This case becomes doubly important then, since the bizarre and incomprehensible

instructions given below, having been stamped with approval by the Sixth Circuit, will undoubtedly be held up as the standard, stock instructions in future Hobbs Act labor exemption cases.

The Government conceded at trial that the Petitioners were entitled to an *Enmons* instruction. The evidence could have justified a jury finding on either side of the labor exemption issue. But the instruction given, which the trial judge drafted himself, was a devastating misstatement of *Enmons,* all but directing a verdict of guilty. The instruction effectively stripped the Petitioners of their primary defense. The Government itself objected to several of the most flagrantly erroneous portions of the charge.

The actual instruction is too lengthy to be repeated here. The entire text is appended hereto as Appendix F. Those portions so clearly erroneous that the Government itself felt compelled to join in the Defendants' objections may be summarized briefly.

First, the court told the jury that use of firearms "to coerce and prevent employees from working is not a legitimate labor activity within the *Enmons* exception." Appendix F, p. 66a. It went on to state that damaging equipment "for the purpose of encouraging employees of such employer to join the union is not a legitimate labor activity within the *Enmons* exception." Appendix F, p. 67a. These instructions are incomprehensible in light of the fact that the *Enmons* defendants themselves were indicted for damaging equipment with firearms. 410 U. S. at 398. As in *Enmons,* the Petitioners' goal of unionizing Ray-Mac

was legitimate and protected, regardless of the violent means used to achieve it.

Next, the trial court charged to the effect that if the picketing and other activities were not authorized by the district and international levels of the UMWA, the picketers would not be protected by *Enmons*. The trial judge seemed to believe that if the picketers were not acting as or under the authority of a labor organization, they were not entitled to an *Enmons* defense. The Government, on the other hand, joined the Defendants in objecting to this charge, correctly pointing out that the United States Government was not in the business of policing wildcat strikes under the guise of a Hobbs Act prosecution. See *WSB Electric* v. *Rank & File Com. to Stop 2-Gate Sys.*, 105 F.R.D. 417, 419 (D. Mass. 1984) (picketing to achieve legitimate labor goal protected by *Enmons* regardless of whether picketers constitute a labor organization).

Finally, the Court gave an instruction that even the Opinion below acknowledged was "somewhat confusing." Appendix A, p. 19a. The trial court stated: "A legitimate act wrongfully performed may become unlawful and outside the protection of the *Enmons* exception." Appendix F, pp. 64a-65a. As with the other portions of the charge mentioned above, even the Government recognized that this instruction improperly focused the jury's attention on the Defendant's admittedly wrongful means, rather than their legitimate stated goals. The trial court rejected the Government's suggestion that the charge be changed to show that the

objective, rather than the means, must be wrongful to support a Hobbs Act conviction.

The Petitioners never seriously contested at trial that the means used (blowing up equipment, burning a tipple, shooting firearms) were wrongful, though each particular person's involvement in those activities was unclear and disputed. They never denied that the activities were not sanctioned by the upper levels of the UMWA. They primarily rested their defense on the seemingly simple proposition that violence undertaken incident to a pursuit of a legitimate labor objective was a matter for state courts, exempt from federal prosecution under the Hobbs Act. Thus, under proper instructions, the jury's task would have been to merely determine what the Defendants' true goals were. The trial court's instructions that wrongful means employed and lack of sanction from the union removed the protection of *Enmons* misdirected the jury's attention, deprived the Petitioners of their primary defense and, in effect, directed a verdict of guilty.

The Opinion below seemed to recognize, at least implicitly, that the trial court's statements cited above were erroneous. In approving the instruction as given, however, the Sixth Circuit made much of the fact that the charge also contained correct statements of law which supposedly put the incorrect statements in a proper context. Appendix A, p. 19a. In so holding, the Court of Appeals ignored its own well-established principle that "First instructing a jury in one way and then in another, as was done here, requires reversal for

a new trial . . . ." *United States* v. *Walker,* 677 F. 2d 1014, 1016 n.3 (6th Cir. 1982).

In all fairness to the trial judge, is it not surprising that his self-drawn instruction was so completely contrary to the true holding of *Enmons.* The pure and clear holding of that case that violence incident to the pursuit of legitimate labor objectives is outside the scope of the Hobbs Act has been diluted, distorted and clouded by the appellate decisions which have sought to limit it to its own specific facts. In trying to explain to the jury the various limitations these appellate courts have placed upon *Enmons,* the trial judge lost sight of the basic principles enunciated in that case. A writ of certiorari should be granted in this case so that this Court may once and for all halt this continuing erosion and distortion of *Enmons* and prevent the trial court's mistakes from being repeated by future judges struggling to instruct juries on the labor activities exemption.

CONCLUSION

The Petitioners therefore pray that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

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APPENDIX

APPENDIX A

Opinion and Order of the United States Court of Appeals for the Sixth Circuit (July 11, 1985)

UNITED STATES COURT OF APPEALS
Sixth Circuit

Nos. 84-5474, 84-5511, 84-5523, 84-5524 and 84-5525

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

EDGAR JONES,
MOSE MEADE,
GERMAN STUMBO,
KENNETH ROWLAND and
TEDDY KINNEY, - - - - *Defendants-Appellants.*

Argued May 1, 1985.
Decided July 11, 1985.

Before ENGEL and MARTIN, Circuit Judges and TIMBERS, Senior Circuit Judge.*

TIMBERS, Senior Circuit Judge.

Edgar Jones, Mose Meade, German Stumbo, Kenneth Rowland and Teddy Kinney appeal from judgments of conviction entered May 29, 1984 in the Eastern District of Kentucky, G. Wix Unthank, District Judge.

All appellants were convicted after a jury trial of one count of conspiracy to obstruct interstate commerce by force and violence and of one count of extortion resulting in such obstruction, in violation of the Hobbs Act, 18 U.S.C. § 1951 (1982) (the Act). The extortion conviction arose from the bombing of mining equipment belonging to the Ray-Mac Coal Co. (Ray-Mac), a competitor of Jones. Stumbo also was convicted of destruction of property by use of explosives, in violation of 18 U.S.C. § 8446 (1982). Meade also was convicted of a second count of extortion, in

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*Honorable William H. Timbers, United States Court of Appeals, Second Circuit, sitting by designation.

violation of 18 U.S.C. § 1951, arising from the destruction of a coal tipple by arson.

All appellants were sentenced to consecutive terms of three years imprisonment on the conspiracy and the first extortion count; the court ordered, as to all appellants, that the sentences on the extortion count be suspended and appellants be placed on probation for two years. In addition, Meade and Stumbo were sentenced to consecutive terms of imprisonment of three years and eighteen months, respectively, on their additional convictions of destruction of property and extortion, respectively; the court ordered that the additional sentences imposed on Meade and Stumbo be suspended and that they be placed on probation for a period of two years. In short, the net sentence of imprisonment imposed on each appellant was three years. All appellants are free on bond pending appeal.

I.

We summarize only those facts believed necessary to an understanding of our rulings on the legal issues raised on this appeal.

Jones was the part owner and president of the JRM Coal Co. (JRM), a company that marketed coal that was mined by a group of contract mine operators. Stumbo was one of these operators, as were accomplices Phillip and Pearl Booth, who entered into plea agreements in return for their testimony at trial. All of the operators in JRM's network had labor contracts with the United Mine Workers of America (UMWA).

In early 1982, JRM had a long-term contract to sell coal to South Carolina Electric and Gas Co. (South Carolina Electric). A force majeure clause in the contract relieved JRM of its obligation, in the event of a labor dispute or strike, to provide 7500 tons of coal per week. In mid-February 1982, JRM faced a depletion of coal available for

shipment. Jones became concerned that Ray-Mac, a non-union operator, would take advantage of JRM's shortage and attempt to sell to South Carolina Electric at reduced prices. Jones enlisted UMWA local officials, including appellant Kinney, to stage a strike that would shut down Ray-Mac by preventing access to Ray-Mac's mine. The strike at JRM's affiliated mines also would allow JRM to invoke the force majeure clause and prevent noncompliance with the terms of its contract with South Carolina Electric.

JRM agreed during the strike to pay the wages of the miners employed by the contract mine operators. Booth and the other JRM affiliates told their miners to go on strike, explaining that it was necessary to protect the contract and preserve their jobs. The miners went on strike. A representative of the district office of the UMWA arrived and told the miners to return to work because the strike was illegal, but the miners remained off the job.

JRM financed the purchase of a large number of weapons by the Booths, who then provided the weapons to the strikers. Jones provided a case of whiskey to keep the strikers "fired up". The strikers set up picket lines in front of Ray-Mac's mine to prevent the non-union workers from reporting to work. Ray-Mac then organized an armed convoy to transport its workers safely past the picket line. On February 16, 1982, as the convoy attempted to enter the mine, one of the strikers produced a pistol and fired at the driver of the first truck. The driver was not injured. Other strikers began firing at the convoy and fire was returned from armed escorts of the convoy. Phillip Booth and another striker were injured.

During the next two days, Stumbo, Rowland and Kinney went into the hills overlooking the Ray-Mac site. From this vantage point, they were able to shoot at Ray-Mac equipment with the intent of disabling it. This tactic proved ineffectual. It was decided that, to put Ray-Mac

out of business, they would have to blow up Ray-Mac's equipment. Jones enlisted Stumbo and another, Panhandle Moore, also known as the "timber rats", to destroy equipment with the use of explosives. The two men filled an inner tube and a basketball with dynamite and attached fuses. The basketball was attached to a bulldozer. The inner tube was placed on a mining auger. The basketball failed to explode, but the auger was heavily damaged by the dynamite in the inner tube.

In mid-February 1982, Ray-Mac's affiliated company, Coal-Mac Sales, Inc., leased a tipple for use at the Ray-Mac site. Jones was concerned that the tipple would allow Ray-Mac to save two dollars a ton on trucking costs. Panhandle Moore was enlisted, along with Meade and another, to burn the tipple. This operation was carried out successfully.

II.

On appeal, appellants urge what we believe to be two principal claims of error.

First, they argue that the district court erred in denying their motion, made while the trial was in progress, for an evidentiary hearing to determine whether there was prejudicial impropriety in the swearing, by the grand jury foreman, of a federal investigative agent as an "agent of the grand jury". With respect to this claim, appellants also argue that the court erred in denying their motion to dismiss the indictment.

Second, appellants challenge the court's jury charge on their *Enmons* defense. *United States* v. *Enmons,* 410 U. S. 396 (1973).

While other subordinate claims of error are raised, we shall devote this opinion, as counsel did at oral argument before us, chiefly to the two principal claims of error stated above.

(A) *Swearing of Agent McAllister as an "Agent of the Grand Jury".*

Dennis McAllister, an agent of the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, was the "case agent" who supervised the investigation of the events that led to the indictment and conviction of appellants. McAllister first became involved in the investigation on February 21, 1982 in response to a report on the bombing of the coal auger at the Ray-Mac site. It was he who discovered the unexploded bomb that had been attached to the bulldozer at the site. From that day forward, McAllister led the investigation and coordinated the use of undercover agents who infiltrated the group of striking miners believed responsible for the violence.

On October 4, 1982, McAllister appeared before the grand jury that had been convened in the case. McAllister testified as to his involvement in the investigation and presented the grand jury with an overview of the case. At the conclusion of McAllister's testimony, the government's attorney stated:

> "Mr. Foreman, one further thing, because of the records of this Grand Jury, a lot of records have been obtained; I'd ask you, if you would, to make Mr. McAllister an agent of this Grand Jury for the purpose of retention of the physical documents in the course of this investigation, and for the purpose of obtaining voluntary compliance with subpoenas."

The record reflects that McAllister then was sworn as an "Agent of the Grand Jury to assist in this Grand Jury's investigation, and retention of records".

[1, 2] Appellants contend that these facts were unknown to them until February 7, 1984, during McAllister's testi-

mony at trial. At that time the prosecutor sought to use McAllister's status as "agent of the grand jury" for the purpose of establishing the chain of custody of, and thereby authenticating, certain exhibits that had been produced before the grand jury. On February 20, 1984, some two weeks later but before the close of the government's case, Jones moved to dismiss the indictment for prosecutorial misconduct, alleging several grounds for such dismissal.[1] Among them was the allegation that "the defendant believes that the Government has violated the grand jury secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure by having Special Agent Dennis McCallister [sic] appointed as an 'agent' of the grand jury." In his supporting memorandum of law in the district court, counsel for Jones asserted his belief that the secrecy requirements of Rule 6(e) had been violated and urged that "an inquiry must be conducted by the Court to determine whether a violation of Rule 6(e) has occurred." In oral argument before the district court on the motion, counsel

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[1]In support of this motion, appellants argued in the district court, and again before us, that the government failed to release at the proper time certain tape recordings that contained prior statements of two witnesses and constituted possible *Brady* material. *Brady* v. *Maryland*, 373 U. S. 83 (1963). They argued that the prosecutor failed to inform the grand jury that certain witnesses were not credible. These contentions need not detain us. First, the tapes in question were produced in time to be used on cross-examination and, moreover, the court permitted appellants to recall any witnesses for further examination if necessary. In the absence of prejudice, even assuming a violation of *Brady*, reversal is not required. *United States* v. *Campagnuolo*, 592 F. 2d 852, 861 & n. 9 (5th Cir. 1979). Second, there is no requirement that the prosecution present impeachment evidence before the grand jury with respect to witnesses called before that body. *United States* v. *Adamo*, 742 F. 2d 927, 936-38 (6th Cir.), *cert. denied*, ____ U. S. ____, 105 S. Ct. 971 (1985). Failure to do so does not constitute prosecutorial misconduct. *Id.* at 938.

for Jones urged that "the grand jury secrecy requirements of Rule 6(e)" had been violated. The motion to dismiss was denied summarily by the district court from the bench.

As opposed to the emphasis on grand jury *secrecy* in the district court, on appeal, Jones, joined by the other appellants,[2] urged that the practice of swearing an investigative officer as an "agent" of the grand jury impinged upon the *independence and integrity* of the grand jury.

Before reaching the merits of appellants' argument, two procedural hurdles must be considered. Fed. R. Crim. P. 47 provides that a motion made in the trial court "shall state the grounds upon which it is made and shall set forth the relief or order sought." Moreover, pursuant to Fed. R. Crim. P. 12(b)(2), "[d]efenses and objections based on defects in the indictment" must be raised before trial. Failure to do so, in the absence of an extension granted by the court, results in waiver of the defense or objection. Fed. R. Crim. P. 12(f).

Appellants here failed to raise this claim before trial or to move for an extension of time to file a motion raising the claim. They also seek to advance arguments on appeal that were not presented to the district court. It has been held, under Rule 12(f), that "where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal." *United States* v. *Braunig*, 553 F. 2d 777, 780 (2d Cir.), *cert. denied*, 431 U. S. 959 (1977) (citations omitted), *see also*

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[2]It is unnecessary for us to decide, in light of our ruling on the issue, whether the other appellants properly preserved their objection for appeal. We assume, for purposes of this appeal, that Jones's motion was sufficient to preserve the issue as to all appellants.

United States v. *Sachs*, 679 F. 2d 1015, 1018 (1st Cir. 1982); *United States* v. *Seidlitz*, 589 F. 2d 152, 160 (4th Cir. 1978).

Appellants argue that their failure to challenge the indictment prior to trial should not result in a waiver because they were unaware of the grounds for this motion until McAllister was called as a witness at trial. Whatever the merits of this argument, we shall treat the district court's ruling on the motion, made without reference to its tardiness, as implicitly granting relief from the waiver as permitted by Rule 12(f). Moreover, because of the importance and novelty of the claim presented, and because Rule 47 does not specify that the grounds for the motion be presented "with particularity", we shall treat appellants' argument regarding the alleged violation of the independence and integrity of the grand jury as adequately preserved for appeal.

The importance of the role of the grand jury as an independent decision making body within the federal criminal justice system cannot be overstated. The grand jury represents a constitutionally-mandated barrier between the accused and the investigative and prosecutorial agencies of goverment, thus "'protecting citizens against unfounded criminal prosecutions.'" *United States* v. *Sells Engineering, Inc.*, ____ U. S. ____, ____, 103 S. Ct. 3133, 3137 (1983), *quoting Branzburg* v. *Hayes*, 408 U. S. 665, 686-87 (1972).

The grand jury also serves in a separate but equally important role, as an investigative body empowered to call witnesses and to require the production of documents and other tangible evidence. *Sells, supra*, ____ U. S. at ____ 103 S. Ct. at 3137-38. The cloak of grand jury secrecy, rigidly enforced, furthers the investigative function. By assuring all witnesses of anonymity, those who otherwise would be reluctant or unwilling to testify will be more forthcoming. Secrecy also helps ensure the preservation

of evidence and protects the reputations of those who ultimately are exonerated. *Id.* at 3138.

By its nature this independent investigative body of lay citizens has limited means by which it can garner facts and evidence on its own. It must depend on the prosecutor "to secure the evidence or witnesses it requires." *Sells, supra,* ___ U. S. at ___, 103 S. Ct. at 3141. Once that evidence is obtained, moreover, the grand jury often requires the assistance of technical experts to assist in deciphering and analyzing the evidence that has been compiled, such as financial statements or ballistics reports. The temporary and ad hoc nature of the grand jury complicates the safe preservation and storage of the evidence, often including, as in this case, firearms, ammunition and explosives. In these and other aspects of its investigative function, the grand jury cannot be totally independent of the law enforcement agents and prosecutors on whom it necessarily must depend.

There is an inherent tension in the grand jury system that is caused by the need to maintain independence in decisionmaking both in fact and in the public perception, on the one hand, and the necessary reliance on government personnel to assist in the fulfillment of the grand jury's investigative function on the other. It is this tension that appellants seek to exploit.

[3] Appellants on appeal have backed off from their contention, urged in the district court, that the disclosure of grand jury materials to McAllister violated the secrecy requirements of Rule 6(e)(2).[3] In any event, it is clear

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[3]Fed. R. Crim. P. 6(e)(2) provides:

"(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under

(Continued on next page.)

that such disclosure was permissible under the exception created by Rule 6(e)(3)(A)(ii).[4] *United States* v. *Lartey*, 716 F. 2d 955, 964 (2d Cir. 1983). Appellants, moreover, concede that McAllister properly could investigate and report back to the grand jury, as well as summarize and retain custody of the evidence, all in his capacity as case agent. They challenge, however, the ceremony of swearing him as an "agent of the grand jury" because, in their view, this ritual endowed McAllister with more credibility than he otherwise would have had in the eyes of the grand jurors.

Two recent district court opinions outside of this Circuit have criticized the practice of swearing an agent of the grand jury. In *United States* v. *Kilpatrick*, 575 F. Supp. 325 (D. Col. 1983), the court pointed out the absence of any express authorization for the practice in Rule 6, *id.* at 329, and attacked the "blurring of the 'investigative agency', 'prosecuting attorney' and 'grand juror' functions." *Id.* at 327. In *United States* v. *Anderson*, 577 F. Supp. 223 (D. Wyo. 1983), the court focused on what it perceived as the potential for the practice to "undermine public confidence that the grand jury is performing its constitutional function to check the power of the government", *id.* at 232, and held that "It is well within a district court's supervisory

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> paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court."

[4]Fed. R. Crim. P. 6(e)(3)(A)(ii) provides that disclosure may be made to:

> "(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

powers to insure that the grand jury's integrity as an independent body is not destroyed in the public eye." *Id.* at 232-33. We shall address each of the assertions made in these cases.

First, it is difficult to see how the asserted enhancement of McAllister's credibility could have prejudiced these appellants. Appellants do not contend, nor could they in view of the weight of the evidence against them, that, but for McAllister's being sworn as an "agent of the grand jury", appellants would not have been indicted. Absent a showing of actual prejudice, or a substantial threat thereof, the district court correctly denied appellants' motion to dismiss the indictment. *Cf. United States* v. *Morrison,* 449 U. S. 361, 365-66 (1981) (even deliberate violation of Fourth, Fifth or Sixth Amendments does not require dismissal of indictment absent showing of prejudice).

Second, with respect to the authority to swear such "agents", we find at least tacit acceptance of the practice by the Supreme Court, *United States* v. *Mara,* 410 U. S. 19, 20 (1973); *id.* at 24 (Douglas, J., dissenting), and by other courts of appeals. *E.g., In re Grand Jury Proceeding (Mills),* 686 F. 2d 135, 140 n. 4 (3d Cir.), *cert. denied,* 459 U. S. 1020 (1982); *United States* v. *Cosby,* 601 F. 2d 754, 757-58 & n. 6 (5th Cir. 1979); *United States* v. *Stanford,* 589 F. 2d 285, 292 (7th Cir. 1978), *cert. denied,* 440 U. S. 983 (1979). In *Stanford,* the court viewed the practice as a laudable effort to help preserve the secrecy of the grand jury. *Id.*

Third, in the instant case McAllister was sworn by the foreman of the grand jury, not by the prosecutor as in *Kilpatrick, supra,* 575 F. Supp. at 328-29. Appellants do not argue that the grand jury foreman lacked the authority to swear government personnel who assist the grand jury. In our view, appellants place undue emphasis on the word "agent". McAllister was authorized under Rule 6(e)(3)

(A)(ii) to perform the functions attributed to him by appellants. The foreman had the authority to swear him to secrecy. There is sufficient authority to permit the practice.

Fourth, we turn to the concern of the court in *Anderson, supra,* 577 F. Supp. at 232-33, that the public's perception of the integrity of the grand jury may suffer if this practice is permitted. The public's perception indeed is crucial to the effectiveness of the grand jury system. It provides moral suasion where legal authority to compel might be unavailable or impracticable. As with any government institution, whether legislative, executive or judicial, it provides legitimacy and authority for its decisions. We simply are not persuaded, however, that use of the word "agent" in connection with government personnel assisting a grand jury will undermine the foundation of public trust and confidence in the system. As long as the grand jury remains independent *in fact* of the prosecutor and does not become a mere tool to enhance the prosecutor's power, *Sells, supra,* ____ U. S. at ____, 103 S. Ct. at 3143, that confidence will continue and will be well-founded.

[4] There is a strong presumption of regularity that attaches to grand jury proceedings. *Hamling* v. *United States,* 418 U. S. 87, 139 n. 23 (1974); *In re Grand Jury Proceedings (Johanson),* 632 F. 2d 1033, 1041 (3d Cir. 1980). Appellants have failed utterly to sustain their burden of overcoming that presumption.

[5, 6] We hold that the swearing of Agent McAllister as an "agent of the grand jury" was not prosecutorial misconduct and did not warrant dismissal of the indictment. We further hold that, absent an initial showing of prejudice, the court did not abuse its discretion in denying appellants' request for an evidentiary hearing.

(B) *Enmons Instruction*

All appellants were convicted of one count of extortion to obstruct interstate commerce by force and violence in violation of the Hobbs Act, 18 U.S.C. § 1951 (1982)[5] and of one count of conspiracy to so obstruct commerce in violation of the Act. In *United States* v. *Enmons*, 410 U. S. 396 (1973), the Supreme Court held that the Act was not intended to reach acts of violence in furtherance of "legitimate union objectives." *Id.* at 400, 411.

Appellants' primary defense at trial was that the admitted acts of violence were intended solely to organize the nonunion workers at Ray-Mac. This they contend was a "legitimate union objective" within the meaning of *Enmons*. They assert that they should not have been prosecuted under the Act. In accordance with appellants' theory of the case, the court instructed the jury on the *Enmons* defense.[6] It is that instruction which appellants claim was error.

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[5]Section 1951(a) provides:

"§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

[6]We assume, for purposes of this appeal, but without deciding, that appellants Jones and Stumbo were entitled to an *Enmons* instruction in the first instance. We seriously doubt, however, that employers whose conduct arguably constitutes an unfair labor practice in violation of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (2) and (3) (1982), can claim the *Enmons* defense. *United States* v. *Wilford*, 710 F. 2d 439, 444 & n. 10 (8th Cir.

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In *Enmons,* striking workers committed acts of sabotage against their employer's property in their pursuit of higher wages and other benefits. 410 U. S. at 398. The district court dismissed the indictment for failure to state an offense under the Act. *Id.* On direct appeal, the Supreme Court affirmed. *Id.* at 412.

The Court reasoned that the use of the word "wrongful" in the Act, as in "wrongful force" or "wrongful violence," would be superfluous if it described only the *means* employed to obtain property. *Id.* at 399. The Court concluded that the obtaining of property itself must be wrongful in the sense that "the alleged extortionist has no lawful claim to that property." *Id.* at 400. Thus, the Act does not "sweep within its reach violence during a strike to achieve legitimate collective-bargaining objectives." *Id.* at 404.

The Court, however, distinguished cases in which union officials or members use force or threats to extract payments to which they do not have a legitimate claim in the collective bargaining context, such as using threats to obtain personal payments or "wages" in return for " 'imposed, unwanted, superfluous and ficticious services' of workers." *Id.* at 400, *quoting United States* v. *Green,* 350 U. S. 415, 417 (1956). Subsequent decisions of various courts of appeals have refrained from extending the ra-

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(Continued from preceding page.)
1982); *United States* v. *Quinn,* 514 F. 2d 1250, 1259 (5th Cir. 1975), *cert. denied,* 424 U. S. 955 (1976). Moreover, the evidence adduced at trial does not support Jones's contention on appeal that he was a "supporter" of the union in its pursuit of legitimate labor objectives. *United States* v. *Cusmano,* 729 F. 2d 380, 383 (6th Cir. 1983), *cert. denied,* ____ U. S. ____, 104 S. Ct. 3536 (1984). The government, however, conceded in the district court that these appellants were entitled to the instruction and does not press the issue on this appeal. We, therefore, rule only on the issue of whether the instruction as given was a correct statement of the law.

tionale of *Enmons* beyond the facts of that case. *E.g., United States* v. *Cerilli,* 603 F. 2d 415, 419 (3d Cir. 1979), *cert. denied,* 444 U. S. 1043 (1980); *United States* v. *Duhon,* 565 F. 2d 345, 351-52 (5th Cir.), *cert. denied,* 435 U. S. 952 (1978); *Quinn, supra,* 514 F. 2d at 1257. In *United States* v. *Russo,* 708 F. 2d 209 (6th Cir. 1983), we held that *Enmons* does not apply to the extraction of payments in *violation* of the collective bargaining agreement because there could be no " 'lawful claim to that property.' " *Id.* at 215, *quoting Enmons, supra,* 410 U. S. at 400.

In the instant case, appellants do not contend that they used violence to secure higher wages and benefits from *their* employer. Indeed, Jones and Stumbo seek to portray themselves as supporters of the strike by their own employees. Appellants argue that their defense at trial hinged on what they describe as their attempt "to persuade" the employees of a non-union company to join the UMWA and to enforce area wage standards being undermined by the non-union wage scale, despite the union's instruction not to strike.

[7] We need not decide, however, whether *Enmons* applies, as a matter of law, to the use of violence outside of the collective bargaining context and in pursuit of goals other than higher wages and against individuals other than the strikers' employer. Although such goals, if accepted as genuine, fit loosely within the phrase "legitimate union objectives", it is doubtful whether the *Enmons* narrow limitation on the term "wrongful" encompasses such conduct. *Russo, supra,* 708 F. 2d at 215. We believe, however, that the court's instructions were a correct statement of the law and we decide this issue on that ground.

The court instructed the jury, in part, as follows:

> "The *Enmons* exception is that legitimate activities by a labor organization or its representatives, honestly acting and representing its members, are not re-

> strained by Title 18, United States Code, Section 1951 and that a legitimate labor objective cannot constitute extortion as defined by [that section], notwithstanding violence and threats may have occurred in support of such proper union objective."

Appellants do not challenge this instruction. Rather, they select various other statements from the charge, taken out of context, and argue that the entire charge was erroneous. We disagree.

[8] The court carefully structured the charge so that it had two parts. The first assumes that appellants acted in pursuit of legitimate union objectives. The jury thus was instructed that

> "[I]n the matter in which it has heard evidence there is a labor dispute within the *Enmons* exception. That organizing the employees of a business so that they may have a union representative is a proper union objective within the *Enmons* exception. That picketing as herein defined is a legitimate labor activity in support of such goal within the *Enmons* exception. . . . If violence and threats honestly occur as a by-product of a legitimate labor activity, in support of a proper union objective, such acts cannot constitute the extortion defined by [the Hobbs Act]."

Appellants isolate certain statements in the second part of the charge, which assumed a finding of improper purpose behind the acts of violence, and contend that those statements were erroneous. For example, appellants quote the following statement:

> "The use of firearms, firing pistols or rifles, in direction [sic] of employees of other employers, not in necessary defense of self or associate fellow pickets to coerce and prevent such employees from working is not

a legitimate labor activity within the *Enmons* exception."

Appellants fail, however, to quote the statement that immediately precedes the above statement, which clearly sets the use of firearms in the context of an attempt "to wrongfully deprive or deny the right to do business and legitimately compete with another. . . ." All of appellants' other claims of error on this issue are similarly flawed.

We do agree, however, that the statement "a legitimate act wrongfully performed may become unlawful and outside the protection of the *Enmons* exception" is somewhat confusing. A "single instruction to a jury may not be judged in artificial isolation," however, "but must be viewed in the context of the overall charge." *United States* v. *Parks*, 421 U. S. 658, 674 (1975).

We hold that, viewed as a whole, the court's *Enmons* instruction more than adequately focused the jury's collective mind on the distinction in *Enmons* between wrongful ends and wrongful means.

III.

We have carefully considered all of appellants' other claims of error. We find all of them to be without merit and do not warrant extended discussion. We shall mention briefly, by way of example, a few such additional claims of error.

[9] Appellants claim that an ambiguous statement by the prosecutor in his closing argument[7] improperly called attention to the fact that appellant Stumbo did not testify.

---

[7]The prosecutor stated:

"Who were the timber rats? Ed R. [Panhandle] Moore. He is not here to tell us about it. But German [Stumbo] is." Moore was deceased at the time of trial.

Assuming arguendo that the statement may be so read, we believe it is clear beyond a reasonable doubt that the jury still would have returned a verdict of guilty absent the statement. *United States* v. *Hasting,* 461 U. S. 509, 511 (1982). We hold that any error was harmless.

[10] Appellants contend that the courtroom seating arrangements deprived them of their Sixth Amendment right to consult with counsel. Since the trial involved 18 defendants, they were seated in two rows immediately behind the counsel table. Appellants were permitted to pass notes to their attorneys. The attorneys were permitted to get up and hold conversations with their clients. No restriction was placed on communications during recesses. Under these circumstances, we hold that there was no Sixth Amendment violation. *United States* v. *Hart,* 551 F. 2d 738, 739, 741 (6th Cir.), *cert. denied,* 434 U. S. 920 (1977).

[11] Appellants argue that limitations placed on their cross-examination of three government witnesses deprived them of their Sixth Amendment right of confrontation by curtailing their ability to impeach the credibility of those witnesses. All three witnesses, however, were extensively impeached. Pearl Booth said that she was testifying pursuant to a plea agreement and that she had pending a motion for reduction of sentence. She testified that appellant Jones had broken promises to her and financially "broke" her and her husband. She also invoked the Fifth Amendment in the presence of the jury when asked about a bribe to a state official. Phillip Booth testified as to his plea agreement and that he was awaiting sentencing. He testified that he often lied when he had been drinking. He admitted three specific lies in pre-trial proceedings in this case. Phillip Moore was impeached with prior convictions. He also testified that he lied to an undercover agent and that he committed perjury in previous judicial proceedings.

Clearly, the jury was "in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of a witness' motives and bias." *United States* v. *Touchstone,* 726 F. 2d 1116, 1123 (6th Cir. 1984), *quoting United States* v. *Campbell,* 426 F. 2d 547, 550 (2nd Cir. 1970); *see also United States* v. *Smith,* 748 F. 2d 1091, 1096 (6th Cir. 1984). We hold that the court did not abuse its discretion in limiting cumulative cross-examination.

[12] We also hold that the limitation placed on appellants' expert witnesses was not an abuse of discretion, *United States* v. *Kennedy,* 714 F. 2d 968, 974 (9th Cir. 1983), nor was the decision by the court to permit the government to introduce prior consistent statements to rehabilitate certain prosecution witnesses. *United States* v. *Hamilton,* 689 F. 2d 1262, 1273 (6th Cir. 1982), *cert. denied,* 459 U. S. 1117 (1983).

All of appellants' other claims of error similarly are without merit.[8]

IV.

Despite the numerous claims of error urged by appellants in this Court, even appellants' counsel, in oral argument before us, commended the laudable efforts of the able district judge in the long and difficult trial of this case. We agree. As we have stated under similar circumstances, "[e]xperience teaches that while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial

---

[8]For example, appellants claim that a summary of financial reports was improperly admitted. Appellant Meade argues that his "theory of the case" instruction was not given and that he should have been identified to the jury as the defendant to whom the coercion instruction was relevant. None of these contentions has merit.

effect upon the ultimate result." *In re Beverly Hills Fire Litigation*, 695 F. 2d 207, 227 (6th Cir. 1982).

Appellants were convicted after a fair trial on the basis of overwhelming evidence of serious crimes committed more than three years ago. We affirm the convictions of all appellants on all counts upon which they were convicted, and we order that the mandate issue forthwith.

Affirmed.

APPENDIX B

Judgments and Probation/Commitment Orders of United States District Court for the Eastern District of Kentucky (May 25, 1984)

United States of America vs.

United States District Court for

DEFENDANT: EDGAR JONES

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

DOCKET NO. → 83-8-1

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (9/82)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: May | DAY: 25, | YEAR: 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Aubrey Harwell, Albert Moore, Jerry Patton
(Name of Counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. to Counts 1, 4

Defendant has been convicted as charged of the offense(s) of conspiracy to obstruct delay and affect commerce, and the movement of articles and commodities in commerce, by extortion, as defined in Section 1951 of Title 18; aiding and abetting in the obstruction, delaying and affecting commerce and athe movement of articles and commodities in commerce, by extortion, in violation of Title 18, Section 1951, of the United States Code; and Section 2.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

THREE YEARS on Count 1, and THREE YEARS on Count 4, to be served consecutively. Execution of the sentence imposed upon Count 4 is hereby SUSPENDED, and the defendant is placed on p probation for a period of Two Years. The probation period is to be consecutive to the sentence imposed upon Count One, to begin on release from custody. This sentence is imposed pursuant to provisions of Title 18, Section 4205(a) of United States Code.

SPECIAL CONDITIONS OF PROBATION

APresentence report was submitted to the Court prior to the Court prior to imposition of sentence with copies furnished to counsel pursuant to Rule 32, of Federal Rules of Criminal Procedure.
The Court finds that the Victim Witness Protection Act's provisions for restitution do not apply in this case.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

that the defendant NOT BE INCARCERATED IN the same institution in which any of the following defendants are now imprisoned: Pearl Booth; Phillip Booth; Phillip Dale Moore; Van B. Patton; Basil Ray Moore or Jake Moore.; Philman Caudill;.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
THIS DATE May 25 1984
By _____
( ) CLERK
( ) DEPUTY

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

T. WIX UNTHANK, JUDGE Date May 25, 1984

APP. 110

United States of America vs.

United States District Court for

DEFENDANT: GERMAN ETU O

EASTERN ISTRICT OF KENTUCKY
PIKEVILLE

DOCKET NO. ➤ 33-8-3 MAY 29 1984

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date ➤ May 25, 1984

[ ] WITHOUT COUNSEL However, the defendant knew his right to have counsel appointed by the court and was able to

[X] WITH COUNSEL William D. Kirkland

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea

[ ] NOLO CONTENDERE

FINDING & JUDGMENT

There being a [X] finding of GUILTY to Counts 1, 4 and 8.

Defendant has been convicted as charged of the offense(s) of: Conspiracy to obstruct, delay and affect commerce, and movement of articles, etc. in commerce, by extortion; knowingly obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by extortion; maliciously damage and destroy and attempt to damage and destroy by means of explosives, a Salem coal auger and bulldozer, being used for mining of coal for shipment in interstate commerce in violation of Title 18, Sections 1951, and 844(i)

SENTENCE OR PROBATION ORDER

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THIRTY (3) YEARS on Count 1; THREE(3) YEARS on Count 4; EIGHTEEN (18) MONTHS on Count 8, under provisions of Title 18:4205(a). The sentence imposed upon Count 4 to be served consecutively to the sentence imposed upon Count 1 and concurrently to the sentence imposed upon Count 4. The sentence imposed upon Counts 4 and 8 are SUSPENDED and the defendant shall be placed upon probation for a period of TWO YEARS to begin upon release from confinement. EXECUTION of the foregoing sentence is STAYED to June 25, 1984, at which time the defendant shall surrender to the United States Marshal in Lexington, Kentucky no later than 1:00 P.M. The defendant is allowed to continue on bond until date of surrender. A presentence report was submitted to the Court prior to the imposition of sentence with copies furnished to counsel pursuant to Rule 32. The Court finds that the Victim Witness Protection Act's provisions for restitution do not apply in this case.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

COMMITMENT RECOMMENDATION

that the defendant NOT be incarcerated in the same Federal Correctional Institution in which any of the following defendants are now imprisoned Pearl Booth; Phillip Booth; Phillip Dale Moore; Van B. Patton; Basil Ray Moore; Jake Moore; Philman Caudill

FILED MAY 29 1984

SIGNED

[X]

C. WILLIAM TERRY, , 1984

A true Copy Attest
Leslie G. Whitmer, Clerk
U.S. District Court
By: Paula Smith
D.C.

26a

MAY 3 1 1984

Eastern District of Kentucky
FILED

MAY 30 1984

AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CRIMINAL 83-8-3

UNITED STATES OF AMERICA PLAINTIFF

VS:

GERMAN STUMBO DEFENDANT

- O R D E R -

The Court being sufficiently advised of a clerical error in the Judgment and Committment Order signed and filed May 29, 1984,

IT IS HEREBY ORDERED AND ADJUDGED, the following portion - "The sentence imposed upon Count 4 to be served consecutively to the sentence imposed upon Count 1 and concurrently to the sentence imposed upon Count 4" - be changed, and in lieu thereof, read - "The sentence imposed upon Count 4 to be served consecutively to the sentence imposed upon Count 1. The sentence imposed upon Count 8 to be served consecutively to the sentence imposed upon Count 1 and concurrently to the sentence imposed upon Count 4."

The Judgment and Committment in all other respects shall remain in full force and effect.

This the 30th day of May, 1984.

G. WIX UNTHANK, JUDGE

Copies: U.S atty
Wm. P. Kirkland
U.S Marshal - 3 attested & certified copy
U.S Probation
CJA 2 & 4

United States of America vs.

DEFENDANT: TEDDY KINNEY

MAY 30 1984

United States District Court for

EASTERN DISTRICT OF KENTUCKY

DOCKET NO. → PIKEVILLE
83-8-5

JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 (9 82)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH May DAY 25, YEAR 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL William D. Kirkland
(Name of Counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of XXXX
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. to Counts 1, and 4.

Defendant has been convicted as charged of the offense(s) of Conspiracy to obstruct, delay and affect commerce, and the movement of articles,etc. in commerce, by extortion; knowingly obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by extortion, in violation of Title 18, Section 1951, of the United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

THREE YEARS on Count 1, and THREE YEARS on Count 4, to be served consecutively, under the provisions of Title 18, 4205(a). The sentence imposed upon Count 4 is hereby SUSPENDED and the defendant is placed on probation for a period of TWO YEARS. The probation of the defendant is to be consecutive to the sentence imposed on Count 1 and to begin on release from custody. Execution of the sentence heretofore imposed is hereby STAYED to June 25, 1984, at which time the defendant shall surrender to the United States Marshal at Lexington Kentucky not later than 1:00 P. M. The defendant is allowed to remain bond until date of surrender.

SPECIAL CONDITIONS OF PROBATION

A presentence report was submitted to the Court prior to the imposition of sentence with copies furnished to counsel pursuant to Rule 32.F.R.Cr

The Court finds that the victim witness protection act's provisions for restitution do not apply in this case.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant NOT be incarcerated in the same Federal Correctional Institution in which any of the following defendants are now imprisoned: Pearl Booth; Phillip Booth; Phillip Dale Moore; Van B. Patton; Basil Ray Moore, or Jake Moore.; Philman Caudill.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
THIS DATE 5-29-84
By Gayle Smith
( ) CLERK
(X) DEPUTY

SIGNED BY
[X] U S District Judge
[ ] U S Magistrate

FILED MAY 29 1984

U. S. DISTRICT JUDGE

Date May , 1984

28a

MAY 30 1984

United States of America vs.

DEFENDANT: KENNETH ROWLAND /k/a POSTMAN

United States District Court for EASTERN DISTRICT OF KENTUCKY PIKEVILLE

DOCKET NO → 83-8-7

JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 (9 82)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: May DAY: 25, YEAR: 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL William D. Kirkland (Name of Counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~xxxx~~ finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. to Counts 1 and 4.

Defendant has been convicted as charged of the offense(s) of conspiring to obstruct, delay, and affect commerce, and the movement of articles, etc. in commerce, by extortion; knowingly obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by extortion, in violation of Title 18, Section 1951, of the United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

THREE YEARS on Count 1, and THREE YEARS on Count 4, to be served consecutively, under the provisions of Title 18, Section 4205(a) of the United States Code. Execution of sentence on Count 4 is SUSPENDED , and the defendant placed on probation for TWO YEARS. The period of probation is to be consecutive to the sentence imposed upon Count11,and is to begin on release from custody. Execution of the heretofore sentence imposed is STAYED to June 25, 1984, at which time the defendant shall surrender to the United States Marshal at Lexington, Kentucky not later than 1:00 P. M. The defendant is allowed is allowed to continue on bond until the date of surrender. A presentence report was submitted to the Court prior to imposition of ssentence with copies furnished to counsel pursuant to Rule 32.

SPECIAL CONDITIONS OF PROBATION

The Court finds that the Victim Witness Protection Act's provisions for restitution does not apply in this case.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant NOT be incarcerated in the same Federal Correcitonal Institution in which any of the following defendants are now imprisoned; Phillip Booth, Pearl Booth, Phillip Dale Moore, Van B.. Patton, Basil Ray Moore or Jake Moore., Philman Caudill.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S Marshal or other qualified officer

CERTIFIED AS A TRUE COPY ON THIS DATE 5-29-84

BY Gayle Smith ( ) CLERK (X) DEPUTY

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

FILED MAY 29 1984

May 29, 1984

29a

United States of America vs.

United States District Court for EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

DEFENDANT: MOSE MEAD

DOCKET NO.: 83-8-13

JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH: May DAY: 25, YEAR: 1984

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date.

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL T. J. WALSOUM, III
(Name of Counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. as to Counts 1, 4, and 5.

Defendant has been convicted as charged of the offense(s) of conspiring to obstruct, delay and affect commerce and the movement of articles and commodities in such commerce by extortion; knowingly obstruct, delay and affect commerce and did attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in such commerce, by extortion, in violation of Title 18, Section 1951, of the United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE YEARS on Count 1; THREE YEARS on Count 4; THREE YEARS on Count 5, under the provisions of Title 18, 4205A. The sentence imposed upon Count 4 is consecutive to the sentence imposed upon Count 1. The sentence imposed upon Count 5 is to be served consecutive to the sentence imposed upon Count 1 and concurrent to the sentence imposed upon Count 4. The sentences imposed upon Counts 4 and 5 are hereby SUSPENDED AND THE defendant to be placed upon probation for a period of TWO YEARS, to begin upon release of confinement. Execution of the foregoing sentence is STAYED TO July 16, 1984, at whichtime the defendant shall surrender to the United States Marshal at Lexington, Kentucky not later than 1:00 P.M. The defendant is allowed to remain on bond until the date of surrender. A presentence report was submitted to the Court prior to the imposition of sentence with copies furnished to counsel. The Court finds that the provisions of the Victim Witness Protection Act as to restitution does not apply in this case.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant NOT be incarcerated in the same Federal Correctional Institution in which any of the following defendants are now in imprisoned; Pearl Booth; Phillip Booth; Phillip Dale Moore; Van B. Patton; Basil Ray Moore; Jake Moore; or Philman Caudill.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
FEBRUARY 29 1984
A True Copy Attest
Leslie G. Whitmer, Clerk
U.S. District Court
By _____ CLERK
DEPUTY

[X] U.S. District Judge
[ ] U.S. Magistrate

J. WIX UNTHANK, JUDGE

Date May, 1984

FILED MAY 29 1984

APP. 112

APPENDIX C

Excerpts from Voir Dire of jury panel and trial before Judge, G. Wix Unthank, United States District Court for the Eastern District of Kentucky (January 23, 24 and 25, 1984)

5-1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky, Pikeville

Criminal Action 83-8

Pikeville, Kentucky
January 23, 1984
9 a.m.

UNITED STATES OF AMERICA - - - - - - *Plaintiff*

v.

EDGAR JONES,
JASON MOORE,
GERMAN STUMBO,
DREXIL HALL,
TEDDY KINNEY,
BENNY CAUDILL,
KENNETH ROWLAND a/k/a POSTMAN,
RANNY BLANKENSHIP,
EUGENE TACKETT,
HAROLD MOORE,
HERMIT NEWSOME,
TIM MILAN,
MOSE MEAD,
DONAHUE HALBERT,
AUSTIN "BO" MOORE,
PEBO GAYHEART,
LINVILLE MOSLEY,
RAYMOND HALL - - - - - - - - - *Defendants*

TRANSCRIPT OF TRIAL

VOLUME 5

Before the Honorable G. Wix Unthank and a jury

* * * * * * *

5-36

Mr. Pafunda: Yes, Your Honor. Please the Court, in regard to Mr. Self's question on opening statement if we

get a jury by 2 o'clock tomorrow afternoon I would ask could we start opening statements at 9 o'clock on Wednesday morning?

The Court: That is what he said and I said I wasn't going to be pinned down. Didn't I?

Mr. Pafunda: I am sitting down, Your Honor. Thank you.

The Court: All right, I said I don't think we will get into opening statements. I don't think we have that time. But, you know, I am just, I don't think we will get into opening statements. I think we have got other matters we are going to consider before that.

Mr. Kirkland: Your Honor, if the Court please, this is an entirely different matter that has become— I realize we have got a time constraint and I will make it fast. As the Court knows, all our clients are corralled over in the corner of the courtroom. My nearest client is about 15 or 17 feet away from me. We have communicated at every break and we have found that communication is not sufficient to keep each other advised of the things I need to know and things my clients need to know.

5-37

The Court: Swap with Mr. Rowland.

Mr. Kirkland: I may have to do that. That would make Mr. Rowland about 15 feet from his client. I note Mr. Harwell is about 15 or 20 feet from his client.

The Court: Yes, sir.

Mr. Kirkland: My question is this: Though it has been a burden and handicap thus far it will be intolerable at trial. We have given signs to each other. I have looked at them for nods. I cannot be sure they are nodding in response to the question I intend to convey. I need to have my clients immediately adjacent to me, Your Honor, and I seriously request that some minor rearrangements

be done so I can lean over and talk to my client. I really need that, Your Honor.

The Court: Okay. You are on the record. Anything else? We will be in recess until 9 o'clock tomorrow morning.

The Marshall: All rise, please. This Honorable Court will now be in recess until 9 o'clock tomorrow morning.

(Court adjourned at 5:24 p.m., January 23, 1984, to reconvene at 9 a.m., January 24, 1984.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

(s) Susan Chrys Lindstrom
Official Court Reporter

Date: June 25, 1984

6-1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky, Pikeville

Criminal Action 83-8

Pikeville, Kentucky
January 24, 1984
9 a.m.

UNITED STATES OF AMERICA - - - - - - *Plaintiff*

v.

EDGAR JONES,
JASON MOORE,
GERMAN STUMBO,
DREXIL HALL,
TEDDY KINNEY,
BENNY CAUDILL,
KENNETH ROWLAND a/k/a POSTMAN,
RANNY BLANKENSHIP,
EUGENE TACKETT,
HAROLD MOORE,
HERMIT NEWSOME,
TIM MILAN,
MOSE MEAD,
DONAHUE HALBERT,
AUSTIN "BO" MOORE,
PEBO GAYHEART,
LINVILLE MOSLEY,
RAYMOND HALL - - - - - - - - *Defendants*

TRANSCRIPT OF TRIAL

VOLUME 6

Before the Honorable G. Wix Unthank and a jury

* * * * * * *

6-23

The Court: We are going to. And, Mr. Thomas, make sure I don't forget I have got to make a finding of compe-

tency to stand trial of Mr. Tackett on the record. I have to get that on the record affirmatively before we can proceed with the trial.

Mr. Self: Your Honor, I would also like to tender to the Court three proposed questions we discussed yesterday for the Court to ask the panel this afternoon dealing with anybody contact them or—

The Court: All right, let's get the jury in and get it over with before we go further.

(The clerk conferred with the Court.)

(Jury in at 11 a.m.)

(Voir dire continued; reported, not ordered transcribed.)

(Prospective jurors retired from the courtroom at 11:05 a.m., whereupon the proceedings were as follows:)

(The Court conferred with the clerk.)

The Marshall: The jurors are out of the courtroom, Your Honor.

The Court: Thank you, sir.

Mr. Self: Please the Court, there are several matters that need to be taken up at this point. Before we do we have a motion, Your Honor, with regard to this indictment. At

6-24

this time the United States would respectfully move the Court to dismiss the defendant Morris Ray Hall as a defendant in this indictment.

The Court: Who represents Morris Ray Hall?

Mr. Hollon: I represent Morris Ray Hall, Your Honor. Tom Hollon.

The Court: Do you have any objection to that motion, sir?

Mr. Hollon: None that I can think of offhand, Your Honor.

The Court: All right. The motion is sustained.

Mr. Self: Thank you, Your Honor. Your Honor, the other matter—

The Court: Just a moment. Mr. Hall.

Defendant Hall: Yes?

The Court: You are excused, sir.

Defendant Hall: Thank you, sir.

(Defendant Hall retired from the courtroom at 11:07 a.m.)

Mr. Self: And we will advise the Court that in reading the indictment to the jury during the opening statement that I will delete Morris Ray Hall from the indictment as a named defendant therein.

The Court: All right.

* * * * * * *

6-30

The Court: Mr. Marshal, go get me 526 F. 2d.

(The Court conferred with the marshal.)

Mr. Self: Your Honor, we don't want to rush the Court. If the Court wishes to consider that over the noon recess before the jury is brought back the Court will have more time to take it up we will have no objection to the Court doing that at that time.

Mr. Dause: Your Honor, if I might for the record state for the defendants' sake that I have passed to you through the marshal excerpts from cases of *Gleason* and *Scott* which I am sure the Court will review in full context later.

The Court: Just a moment, gentlemen.

Mr. Self: Let me state the Government still has the copies of the jury questionnaires downstairs. You all may pick those up if you desire.

The Court: All right, let's go on to the other thing. I will take that up at the recess, gentlemen. Go ahead.

Mr. Self: The other thing is there has been objections by the defendants during the course of these proceedings

as to seating arrangements and the Court's seating arrangements. I would ask the Court to make a part of the record the latest schematic diagram of this courtroom prepared by GSA in remodeling it so the Court on appeal can have a chance to view this

6-31

courtroom and the small confines that exist in it if that issue is raised and ask that just be made a part of the record.

The Court: The Court is going to request that a diagram of this courtroom be made with the dimensions on it and it is going to be a Court exhibit, gentlemen. And that will be placed in the record. It will not be shown to the jury. But it will designate where each counsel is seated. It will also designate where their client is going to be seated. And the relation thereto.

Mr. Self: And ask the Court again just to articulate for the record the basis for its previous rulings as to why the defendants are to be seated in the rear of the courtroom. I think it may have done it in a piecemeal fashion when it came up but just as a statement in summation and not a specific if the Court feels it is necessary at this point to do so.

The Court: The Court is designating where the defendants are and designating if there is going to be any difficulty with persons who may come in and watch the, observe the trial, the Court is going to designate the procedure and the manner in which this is being made, because it is a complex matter, we have numerous defendants and it is this Court's duty to see that we have an orderly and expedient and proper trial for all these defendants.

Mr. Self: Your Honor.

Mr. Pafunda: Your Honor.

6-32

Mr. Self: I would like the record also to reflect during the course of the voir dire proceedings and the course of mini-proceedings the defendants have had the opportunity and provided the necessary material to pass notes back and forth to counsel at all times when requested by the—requested they have had the opportunity to consult with their defendant, their specific defendants at any specific time that request has been made by the Court.

Mr. Pafunda: Your Honor.

The Court: Yes, sir.

Mr. Pafunda: Please the Court, and of course this issue has been addressed in the earlier proceedings at least a month ago. However, I would ask the Court to reconsider its position in this matter and offer a suggestion. It appears that additional tables will have to be placed here for Mr. Kirkland and other defense counsel who are on the back row so they will be able to write during the course of this trial and adequately prepare defense and take notes of testimony and exhibits and so on and so forth.

It has been my notion as I look at this group of men that possibly each of them could be placed in a chair, if tables were placed this way there is enough room on this side of the red string rope for these gentlemen to be seated along this wall in a position such they would be close to their respective counsel.

6-33

The reason I point this out is because one of my clients, in particular Drexil Hall, is quite concerned that should testimony come from say a certain witness and he would want to comment on that testimony immediately as it happens rather than making a note and pass me a note and that would take an inordinate period of time, that the thought or the dialogue between myself and Mr. Drexil Hall may in some event be lost.

The Court: Let me ask you this: If he makes a comment to you while this witness is testifying, what is that going to do to the jury? They are going to look over there and see you all talking. That is going to divert their attention to what the witness is saying.

Mr. Pafunda: I thought about that. That would occur in let's call it a regular trial, just one defendant and one attorney. And as a witness testifies I may be conferring with my client and the jury as the Court well knows in instances would have occasion to observe that. In this instance—

The Court: Wouldn't it be distracting?

Mr. Pafunda: No more than—

The Court: Let's assume your client spoke too loud or something like that.

Mr. Pafunda: If I may, Your Honor, that could occur during the course of a single defendant trial. He could speak too loud or he could become unruly. In that event it would

seem appropriate that the Court could take the appropriate action. My request is simply to see if there is an alternative to the Court's previous suggestion. If they were allowed to seat, be seated against this wall so they would be at least in close proximity with their attorneys and then be able to communicate with them verbally in a soft-spoken manner, I do not think it would be disruptive. We could just try it and see what happens.

There is another point here, too. The trial of this case is supposed to be a public trial. As you can see, most of these men would take up several rows on this side of the courtroom, thereby almost reducing the size of the courtroom in half. It would open up the courtroom I think to the public. That is offered as a suggestion, Your Honor.

There is a lot of room down this way and possibly we could try it. If it doesn't, we would know after a day or so.

And in that regard, if notes are to be passed from say the third row back where the spectators would be seated, what type of confusion would that create and would the jurors notice that confusion as the note is passed along? Say if Mr. German Stumbo is on the last row and he wants to make a note and get it to his attorney and he passes it through the crowd of men and then over the rail or to a marshal to pass on to his lawyer, there would be that type of commotion, too.

The Court: All right.

6-35

Mr. Thomas: Your Honor, David Thomas. I join in his motion, too, to put a table down there and put the defendants behind. Another problem we have I know several of us have clients who have trouble writing, whether it is they can't write or spell or they just write slowly. If there is a direct examination going on of the witnesses here it is going to be very difficult for these men to keep up with the things that are said. They may have one thing written down when they need to write down four or five. In the time, there is no way they can keep up with everything that is said and it just gives us no ability to on cross-examination.

Mr. Walbourn: Your Honor, Mr. Self asked to be placed in the record that during the voir dire of this prospective jury panel the defense counsel was able to receive messages or communications with their clients. I will agree that the record can reflect that the clerk's office furnished for each defendant a pad and a pen. I wrote a note to my client. It took about 14 minutes for the note to get down, get back to me. By the time the note got to me the information I needed for voir dire was, had long since passed.

So while we have had the means to communicate that has not been an effective means and certainly during the course of the trial you want to receive—The function in questioning a witness is to ascertain the facts as that witness knows them. Ofttimes the best person to apprise you of other facts or say

6-36

to remind you didn't such and such happen is to have your client tell you that so you can communicate that to the witness.

Mr. Hollon: Your Honor, Tom Hollon.

The Court: Anything else, gentlemen?

Mr. Hollon: Tom Hollon, representing Pebo Gayheart. I have stated this to the Court before I think at the hearing we had approximately a month ago communication setup with the pads and the pen is particularly ineffective for Mr. Gayheart. He not only writes slowly, he doesn't write at all, Your Honor. So I have no communication with him at all. Unless perhaps another one of the defendants wrote it and I certainly don't think that is satisfactory and that certainly hinders my effectiveness.

The Court: All right, anything else?

Mr. Kirkland: Your Honor, I have noticed this morning I have had continuing difficulty. One of the prospective jurors, who by the way was four feet from me, said something that I thought was significant that my clients should hear who say were thirty feet away or so. I looked back. I could not stand, obviously. I could not see the faces of any of my clients. I dodged around through the heads. I finally got the attention of either Mr. Hall or Mr. Stumbo.

I tried to mouth to him the problem that I had perceived. He didn't know what I was talking about and I could not walk over to him. Had I written him a note it would have taken

6-37

three or four minutes at best to get to him and then we would have gone through the sign language and mouthing routine again. All of which does not give me sufficient communication from my clients that I ordinarily get.

I realize that this is a strange situation with now 18 defendants and 11 or 12 lawyers. But in the calculations that we have been able to do, Your Honor, it would appear that the clients, the defendants can be spread out around behind their respective counsel so that we can at least lean back and get some kind of communication quickly which is critical to any trial, Your Honor, is to get the instant reactions of your client to something. When a witness says something that is incorrect, my client needs to be able to say no that didn't happen.

Under these conditions and the ones that I understand that will prevail I simply will not have that kind of communication. I have not had it during the selection of the jury. I certainly did not have it at the mini-trial where all defendants were back in the back of the courtroom. I would have the same situation, Your Honor, of not being able to see my clients, not being able to see their face or their head. I do not think that I can properly, effectively communicate with my clients by the method that has heretofore been used. And I have experienced bad, bad situations, Your Honor. It is not that I am projecting.

6-38

(A note was handed to Mr. Walbourn.)

Mr. Kirkland: It has already happened to us, Your Honor. I have been able to talk to my clients at breaks and that is the only time I can talk to them.

The Court: Anything else, gentlemen?

Mr. Walbourn: Yes, Your Honor. I just received a communication from one of my clients via the marshal. Mr. Benny Caudill. And he raises an excellent point. He

says, "If I can't sit close to my lawyer, why do I need a lawyer?" I think that perhaps sums up anything we need to be able to communicate with each other.

(The clerk conferred with the Court.)

Mr. Pafunda: Your Honor, if it please the Court, as I listen to counsel argue this particular point the thought came to mind one of the Court's earlier remarks at the beginning of this week that we are here in a new type of experience with a great number of people involved, both lawyers and the gentlemen that are seated over here, and the Court I think on Monday morning said we are going to proceed and take this bit by bit slowly and see how it works.

Just as a suggestion I think the recommendations that have been made with regard to the seating arrangements for these gentlemen, I don't see what harm would occur if we just tried it say the first day and then if there were any disruptions or disorderly conduct or distractions for the jurors who are

6-39

listening to the evidence, then wouldn't it be a simple remedy to refer to the Court's earlier suggestion?

The Court: Let me ask this. Mr. Harwell, I see Mr. Jones has three attorneys sitting there at the table. The other defendants have their counsel which are back there. Would you much rather have Mr. Moore or Mr. Jones sitting beside of you?

Mr. Harwell: Tough question, Judge. I would sure like to have them both close to me, obviously.

The Court: But if it couldn't be done?

Mr. Harwell: If it couldn't be done, Judge.

The Court: If it couldn't be done because of the limitation upon space.

Mr. Harwell: Judge, Mr. Moore is going to be actively participating in the course of this case. He is going to be on his feet.

The Court: Yes, sir.

Mr. Harwell: I am not dancing with you, Your Honor. I honestly don't know. I haven't thought how it would be for him to come from outside the bar inside the bar to address the Court. That bothers me. If it weren't for that fact I would like to have Mr. Jones next to me.

Mr. Moore, I don't want to hurt your feelings, you understand.

The Court: Mr. Patton will have a seat, relinquish

6-40

your place at the desk to one of the people.

Mr. Patton: Your Honor, I wouldn't mind, if Mr. Jones wants, to sit back here with the other defendants, sit back here with them. It would be perfectly okay with me.

The Court: Well, we obviously are going to have, we have got Mr. Rowland, Mr. Branson, Mr. Hollon, Mr. Thomas and Mr. Kirkland. They need desk or table space. We are obviously going to have to find space for them, gentlemen.

Mr. Rowland: We really do.

The Court: Now, this other thing, we have three attorneys just for one client and we have, there is Mr. Kirkland. You represent how many, Mr. Kirkland?

Mr. Kirkland: Five, Your Honor.

The Court: He represents five and he don't have table space.

Mr. Kirkland: Your Honor, I am not complaining about lack of table space. I bought an excellent clipboard and I have several yellow pads. I am being a little bit facetious, but I am not complaining about lack of table space, although that is a problem.

The Court: We are going to put you with table space.

Mr. Kirkland: I appreciate that. My problem is not being able to communicate with my clients during these proceedings.

* * * * * * *

6-55

The Court: All right. Fine.

Are we ready, gentlemen, to have the— On the trial, gentlemen, we are going to come in and add one more table down here which comes down here. Now, where you sit at this table is up to you gentlemen. But Mr. Jones is only going to be entitled to one counsel at these tables. In other words, your other two counsel will sit behind you. We have got two rows of benches, we are going to have two rows of benches back where Mr. Rowland and those are sitting. We are going to have two rows of nine each. The eighteen defendants will be seated there. And where they sit there is up to the defendants.

Mr. Pafunda: Thank you, Your Honor.

The Court: We are going to try that. We are going to try that, gentlemen, for a while to see how that works.

* * * * * * *

7-1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky, Pikeville

Criminal Action 83-8

Pikeville, Kentucky
January 25, 1984
9:07 a.m.

UNITED STATES OF AMERICA - - - - - - *Plaintiff*

v.

EDGAR JONES,
JASON MOORE,
GERMAN STUMBO,
DREXIL HALL,
TEDDY KINNEY,
BENNY CAUDILL,
KENNETH ROWLAND a/k/a POSTMAN,
RANNY BLANKENSHIP,
EUGENE TACKETT,
HAROLD MOORE,
HERMIT NEWSOME,
TIM MILAN,
MOSE MEAD,
DONAHUE HALBERT,
AUSTIN "BO" MOORE,
PEBO GAYHEART,
LINVILLE MOSLEY,
RAYMOND HALL - - - - - - - - *Defendants*

TRANSCRIPT OF TRIAL
VOLUME 7

Before the Honorable G. Wix Unthank and a jury

Appearances:

For the Plaintiff:

Thomas L. Self, Esq.
Charles L. Dause, Esq.
Randy R. Kehrli, Esq.

* * * * * * *

7-40

The Court: All right, fine. At this point I am going to keep it. Other matters now, if your client has a particular matter, gentlemen, I assume that the other attorneys—The Court did not, the Court as to the seating of the defendants, as to the seating of the table of counsel, gentlemen, the Court didn't put any particular order. I am leaving that up for counsel to work this out. Now, if you have a particular disability you gentlemen discuss that among yourselves and see if you can work it out. If you can't, then get back with the Court and we will see.

Mr. Harwell: Judge, is it contrary to Your Honor's protocol in a case such as this if counsel quietly and discreetly go down and whisper to the client? Is that against Your Honor's wishes?

The Court: No, sir.

Mr. Harwell: Can we do that?

The Court: That would be fine.

Mr. Walbourn: Your Honor, in regards to that also in view of what my client—

The Court: Let's don't do it this way, gentlemen.

Mr. Harwell: Obtrude.

7-41

The Court: We get up and do it during the Government's proof but we don't get up and do it during the defendants' proof. Let's don't have it on purpose.

Mr. Walbourn: In that same regard I have advised my clients if they need my attention and don't see me they are free to come up and discreetly advise me.

The Court: No, I don't want the defendants up moving around the Court. You understand they are defendants. Now, this is for security reasons. I want the defendants to remain in their seat. Counsel can go back and talk to them. They will— What I want them to do is to— They are close enough now, I think what, five or six feet is going to

be about the farthest any of them is going to be from where they are, gentlemen, and they can get word to you to come there.

Mr. Rowland: Judge, you are saying then we can get up and go see them for a few seconds if we need to do that?

The Court: Yes, sir. Let's do it discreetly and where it doesn't draw attention to it so it will divert the attention of the jury.

Mr. Rowland: Okay.

The Court: In such a manner as to not distract the jury.

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APPENDIX D

Diagram of seating arrangement at trial

APPENDIX E

Excerpts from testimony of Dennis L. McAllister before Judge, G. Wix Unthank, United States District Court for the Eastern District of Kentucky (February 7, 1984)

14-1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky, Pikeville

Criminal Action 83-8

Pikeville, Kentucky
February 7, 1984
9 a.m.

UNITED STATES OF AMERICA - - - - - - *Plaintiff*

v.

EDGAR JONES,
JASON MOORE,
GERMAN STUMBO,
DREXIL HALL,
TEDDY KINNEY,
BENNY CAUDILL,
KENNETH ROWLAND a/k/a POSTMAN,
RANNY BLANKENSHIP,
EUGENE TACKETT,
HAROLD MOORE,
HERMIT NEWSOME,
TIM MILAN,
MOSE MEAD,
DONAHUE HALBERT,
AUSTIN "BO" MOORE,
PEBO GAYHEART,
LINVILLE MOSLEY,
RAYMOND HALL - - - - - - - - - *Defendants*

TRANSCRIPT OF TRIAL

VOLUME 14

Before the Honorable G. Wix Unthank and a jury

Appearances:

For the Plaintiff:

Thomas L. Self, Esq.
Charles L. Dause, Esq.
Randy R. Kehrli, Esq.

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14-256

Mr. Self: I need to know whether I have to have the court reporter here.

Mr. Kirkland: I just have five questions, Your Honor.

The Court: Can you stand five questions?

Mr. Pafunda: Yes, sir.

Mr. Self: Your Honor, we have one other matter we need to take up, too, after this.

The Court: Mr. Pafunda can't be here. He has got problems.

Mr. Spencer: It only takes about a half-hour to drive to Prestonsburg.

The Court: I think that's the reason he is up there in Prestonsburg now.

Mr. Spencer: I drive it in half an hour every day.

The Court: It didn't take him that long.

Go ahead, Mr. Kirkland.

Voir Dire Examination by Mr. Kirkland

Q. Mr. McCallister, at the time and place that's been discussed here today with respect to the grand jury, were you acting as a Government personnel deemed necessary by an attorney for the Government to assist him in the performance of his duties?

14-257

A. Yes.

Q. Now, are you also telling us, I assume by the reading of this transcript, in addition to being the attorney assisting the Government lawyer—

Mr. Self: Objection, Your Honor. He is not an attorney. He is an agent assisting the United States Attorney.

By Mr. Kirkland:

Q. Government personnel, excuse me. That in addition to being a Government personnel assisting the attorney for the Government, that you deemed yourself to be an agent for the grand jury as well; is that right?

A. No, sir. The foreman of the grand jury swore me as an agent of the grand jury.

Q. So then is it your testimony here today that you had a dual role or a dual function with that grand jury; that is, assisting Mr. Self and also being an agent of the grand jury?

A. Yes, sir.

Q. Now, I know you are not a lawyer, but do you know of any legal authority for making you an agent of the grand jury?

The Court: The only thing he would know is what they told him.

The Witness: Yes, sir. I was sworn by the foreman of the grand jury. I assume he had the legal authority to do that.

By Mr. Kirkland:

14-258

Q. And he assumed that because Mr. Self said go swear him; is that right?

A. It's been a common practice throughout my career with the Treasury Department.

Q. But you don't know of any authority for it; is that right?

A. No, I don't.

Q. Now, were you present at any time when the grand jury voted on the issuance of the subpoena which is the subject of this hearing?

A. No, sir.

Q. Is it a usual practice of the grand jury to vote on the subpoenas, or are they made up totally in the U.S. Attorney's Office at the discretion of the U.S. Attorney or his staff?

Mr. Self: Your Honor, I have to object. I don't think he can testify he was present when these subpoenas were voted on by the grand jury.

The Court: Sustained.

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APPENDIX F

Excerpts from Court's instruction to jury by Judge, G. Wix Unthank, United States District Court for the Eastern District of Kentucky (April 6, 1984)

44-1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky, Pikeville

Criminal Action No. 83-8

Pikeville, Kentucky
April 6, 1984
9 a.m.

UNITED STATES OF AMERICA - - - - - - *Plaintiff*

v.

EDGAR JONES,
JASON MOORE,
GERMAN STUMBO,
DREXIL HALL,
TEDDY KINNEY,
BENNY CAUDILL,
KENNETH ROWLAND a/k/a POSTMAN,
RANNY BLANKENSHIP,
EUGENE TACKETT,
HAROLD MOORE,
HERMIT NEWSOME,
TIM MILAN,
MOSE MEAD,
DONAHUE HALBERT,
AUSTIN "BO" MOORE,
PEBO GAYHEART,
LINVILLE MOSLEY,
RAYMOND HALL - - - - - - - - *Defendants*

TRANSCRIPT OF TRIAL

VOLUME 44

Before the Honorable G. Wix Unthank and a jury

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44-134

The defendants also contend they are not guilty of the charge of conspiracy by reason that their acts, if any, can-

not constitute the extortion as defined by Title 18, United States Code, Section 1951 by reason of an exception to said statute sometimes referred to as the *Enmons* exception.

The jury is instructed that when an exception to a statute is made the basis of the defense, the burden is upon the United States to prove to the exclusion of a reasonable doubt that the act or acts of a defendant or defendants do not come within such exception.

The *Enmons* exception is that legitimate activities by a labor organization or its representatives, honestly acting and representing its members, are not restrained by Title 18, United States Code, Section 1951 and that a legitimate labor activity in a labor dispute in support of a proper labor objective cannot constitute extortion as defined by Title 18, United States Code, Section 1951, notwithstanding violence and threats may have occurred in support of such proper union objective.

The jury is instructed that in the matter in which it has heard evidence there is a labor dispute within the *Enmons* exception. That organizing the employees of a business so that they may have a union representative is a proper union objective within the *Enmons* exception. That picketing as herein defined is a legitimate labor activity in support of

such goal within the *Enmons* exception.

Picketing is a legitimate method which persons involved in a labor dispute have the right to employ to notify others of the existence of such dispute and to disseminate information concerning the controversy and to communicate the facts dealing with their side of the dispute.

If violence and threats honestly occur as a by-product of a legitimate labor activity, in support of a proper union objective, such acts cannot constitute the extortion defined by Title 18, United States Code, Section 1951. However,

a legitimate act wrongfully performed may become unlawful and outside of the protection of the *Enmons* exception.

At the time of the alleged occurrence of the event in question, several of the defendants were members of the United Mine Workers of America and some were not. This union is a multi-level labor organization, consisting of the International Union at the top, then the districts, District No. 30 for purposes of this case, and last on the lowest level, the locals, with Local 5967 in this case, consisting of the individual members of the union, and being an unincorporated association of persons primarily engaged in the coal industry. This labor organization is bound together by its agreements of association consisting of the constitution and bylaws for each level of the organization. It can act officially only through its officers, agents and members. An agent is one authorized to

act for another.

The extent of the authority of an officer, agent or employee is determined either by the provisions of the constitution and bylaws together with or by action of members at regularly constituted meetings in accordance with such constitution and bylaws.

An act of an officer, member or agent outside of the scope of authority, unless acquiesced in or approved by the union at the proper respective level, is not an act of a labor organization within the meaning of the *Enmons* exception.

A strike or picket line established outside of the scope of authority of a labor organization or its representatives is a wildcat strike or picket line and is not the act of the labor organization or representative within the meaning of the *Enmons* exception.

For an act to be a bona fide act arising from a labor dispute within *Enmons* exception, it must be an act of a person or association participating or interested in the

labor dispute having a direct or indirect interest therein which act is honestly and in good faith performed in pursuit of a legitimate objective and not used as a mere pretext nor feigned in order to avoid responsibility for an unlawful or wrongful act.

The jury is instructed that to wrongfully deprive or deny the right to do business and legitimately compete with another is a wrongful and unlawful purpose prohibited by the Hobbs Act,

44-137

Title 18, United States Code, Section 1951, and not within the *Enmons* exception thereto.

The use of firearms, firing pistols or rifles, in direction of employees of other employers, not in necesary defense of self or associate fellow pickets to coerce and prevent such employees from working is not a legitimate labor activity within the *Enmons* exception.

Defense of self or another as used in these instructions mean the use of physical force by one person upon another is justifiable when such person believes that such force is necessary to protect himself or another against the use of imminent use of wrongful physical force by the other person either upon himself or another. One may use deadly physical force only when he believes that such force is necessary to protect himself or another from death or serious physical injury.

However, the use of physical force or deadly physical force is not justified as self-defense or defense of another if one claiming self-defense himself provokes the use of physical force by such other person or he himself was the initial aggressor, except that his use of physical force upon the other person under this circumstance is justifiable when he as the aggressor only uses physical force which is non-deadly and the force returned by the other person is such

that one believes himself to be in imminent danger of death or serious physical

44-138

injury; he as the aggressor withdraws from the encounter and effectively makes known to the other person his intent to withdraw and the latter person continues or threatens the use of unlawful physical force.

Physical force as used in the above instruction means force used upon and directed toward the body of another person.

Deadly physical force means force which is used for the purpose of causing death or serious physical injury or which the defendant knows creates a substantial risk of causing death or serious physical injury.

And serious physical injury means physical injury which creates a substantial risk of death or causes serious and prolonged disfigurement, prolonged imprisonment of health or prolonged loss or impairment of the function of any bodily organ.

The malicious damaging or destruction of equipment and facilities in possession or belonging to a nonunion employer by explosion and fire for the purpose of encouraging the employees of such employer to join the union is not a legitimate labor activity within the *Enmons* exception.

Malice means a condition of mind which prompts a person to do wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.

Violence purposely adopted as a course in a labor dispute

44-139

not associated with nor happening to result from any ongoing legitimate labor activity is not violence in conjunction with a labor dispute within the meaning of the *Enmons* exception.

Therefore, whether or not the act or acts of a defendant or defendants at the times and places contained in the evidence were for a wrongful purpose or were wrongful and unlawful activities are issues of fact for determination by the jury.

The burden is always upon the United States to prove to the exclusion of a reasonable doubt that the act or acts of a defendant or defendants at the time and places contained in the evidence are not acts restrained and protected by the *Enmons* exception to Title 18, United States Code, Section 1951. If the act or acts of a defendant or defendants were not wrongful within the *Enmons* exception, such act or acts cannot constitute the extortion defined in Title 18, United States Code, Section 1951.

If the jury finds that a defendant or defendants, if any, were not a willful participant in a conspiracy in any way or degree to obstruct, delay or affect commerce by extortion as defined in Title 18, United States Code §1951, the jury shall find such defendant or defendants not guilty of Count No. 1.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Respondent,

v.

EDGAR JONES, GERMAN STUMBO,
KENNETH ROWLAND, TEDDY KINNEY,
AND MOSE MEADE,

Petitioners.

CERTIFICATE OF SERVICE OF
PETITION FOR WRIT OF CERTIORARI
BY EDGAR JONES, GERMAN STUMBO,
KENNETH ROWLAND, TEDDY KINNEY,
AND MOSE MEADE
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

I, WILLIAM D. KIRKLAND, a member of the Bar of the Supreme Court of the United States, and counsel of record for Petitioners, Edgar Jones, German Stumbo, Kenneth Rowland, Teddy Kinney and Mose Meade, hereby certify pursuant to Rule 28.5, Supreme Court Rules, that I served three (3) certified true copies of the within Petition for Writ of Certiorari on behalf of Petitioners, Edgar Jones, German Stumbo, Kenneth Rowland, Teddy Kinney and Mose Meade, on the 6th day of September, 1985, by depositing said copies at the United States Post Office, Frankfort, Kentucky, in an Express Mail package, with sufficient

postage upon the package for delivery, to the following person at the following last known address thereof, this being counsel for the Respondent in this proceeding:

Mr. Rex E. Lee
Office of the Solicitor General
Department of Justice
Room 5514, 10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20543
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WILLIAM D. KIRKLAND
COUNSEL FOR PETITIONERS

I HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY OF THE ORIGINAL THEREOF

WILLIAM D. KIRKLAND
ATTORNEY FOR PETITIONERS

Supreme Court, U.S.
FILED
NOV 1 [illegible]
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-398

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDGAR JONES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTIONS PRESENTED

1. Whether petitioners were deprived of their Sixth Amendment rights when they were not permitted to sit directly at the counsel table.

2. Whether petitioners' convictions should be reversed and the indictment dismissed on the ground that a law enforcement agent was sworn as an agent of the grand jury.

3. Whether the district court's instructions were consistent with *United States* v. *Enmons,* 410 U.S. 396 (1973).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Cupp v. *Naughten*, 414 U.S. 141	9
Geders v. *United States*, 425 U.S. 80	4-5
Morris v. *Slappy*, 461 U.S. 1	4
People v. *Zammora*, 66 Cal. App. 2d 166, 152 P.2d 180	5
United States v. *Anderson*, 577 F. Supp. 223	7
United States v. *Brien*, 617 F.2d 299, cert. denied, 446 U.S. 919	8
United States v. *Cerilli*, 603 F.2d 415, cert. denied, 444 U.S. 1043	9
United States v. *Clemente*, 640 F.2d 1069, cert. denied, 454 U.S. 820	8
United States v. *Cosby*, 601 F.2d 754	6
United States v. *Cusmano*, 729 F.2d 380, cert. denied, No. 83-1719 (June 18, 1984)	10-11
United States v. *Enmons*, 410 U.S. 396	3, 8, 9, 10
United States v. *French*, 628 F.2d 1069, cert. denied, 449 U.S. 956	8, 9
United States v. *Griffith*, 756 F.2d 1244, cert. denied, No. 84-6876 (Oct. 7, 1985)	8
United States v. *Hasting*, 461 U.S. 499	7
United States v. *Kilpatrick*, 575 F. Supp. 325	7
United States v. *Kilpatrick*, 594 F. Supp. 1324	7
United States v. *Mara*, 410 U.S. 19	6
United States v. *Mechanik*, 735 F.2d 136, cert. granted, No. 84-1640 (June 17, 1985)	8
United States v. *Morrison*, 449 U.S. 361	7
United States v. *Quinn*, 514 F.2d 1250, cert. denied, 424 U.S. 955	9
United States v. *Sells Engineering, Inc.*, 463 U.S. 418	6, 7
United States v.*Sorrentino*, 726 F.2d 876	5

Cases—Continued: Page

United States v. *Stanford*, 589 F.2d 285, cert. denied, 440 U.S. 983 6
United States v. *Thibadeau*, 671 F.2d 75 8
United States v. *Turkette*, 656 F.2d 5 4
United States v. *Vasquez*, 732 F.2d 846 4
United States v. *Walker*, 559 F.2d 356 4
United States v. *Wilford*, 710 F.2d 439, cert. denied, 464 U.S. 1039 9

Constitution, statutes and rules:

U.S. Const. Amend. VI 3, 4
Hobbs Act, 18 U.S.C. 1951 ..... 1, 3
18 U.S.C. 2 1
18 U.S.C 844(i) 2
Fed. R. Crim. P.:
Rule 6(d) 8
Rule 12(b)(1) 6
Rule 12(b)(2) 6

Miscellaneous:

S. Rep. 95-354, 95th Cong., 1st Sess. (1977) 6

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 766 F.2d 994.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1985. The petition for a writ of certiorari was filed on September 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted on one count of extortion and one count of conspiring to obstruct interstate commerce by force and violence, in violation of 18 U.S.C. 1951 and 2. Petitioners were

sentenced to consecutive terms of three years' imprisonment on each count, with the sentences on the substantive count suspended in favor of two years' probation. Petitioner Stumbo was also convicted of using explosives to destroy property, in violation of 18 U.S.C. 844(i), and petitioner Meade was convicted on a second extortion count. Consecutive sentences on these counts were suspended in favor of probation. The court of appeals affirmed (Pet. App. 3a-22a).[1]

1. The evidence at trial, the sufficiency of which is not in dispute (see Pet. 23), showed that petitioners employed violence in an attempt to shut down the Ray-Mac Coal Company, a competitor of the JRM Coal Company. Petitioner Jones was part-owner and president of JRM, which marketed coal mined by a network of mine operators, including petitioner Stumbo, that had signed contracts with the United Mine Workers of America (UMWA). Petitioner Kinney was president of UMWA Local 5967. Pet. App. 4a-5a.

JRM provided coal under a long-term contract to South Carolina Electric and Gas Company. The contract contained a force majeure provision relieving JRM of its obligations in the event of a labor dispute. In early 1982, JRM's available coal stock was depleted, and Jones was concerned that Ray-Mac, which was not unionized, was attempting to jeopardize his contract with the utility by offering lower prices. To protect his interests, Jones arranged with Kinney and other officers of Local 5967 to stage a bogus strike at JRM's affiliated operators that would prevent access to Ray-Mac's mine as well as allow JRM to invoke the force majeure clause. Pet. App. 4a-5a.

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[1] Two counts were dismissed on motion of the government, and petitioners were acquitted on various other charges of extortion and the possession and use of explosives. Thirteen co-defendants were acquitted on all of the counts against them that went to the jury.

Pursuant to this plan, JRM's affiliates instructed their miners to go on strike, notwithstanding the absence of a labor dispute, in order to "shut down Ray-Mac" (C.A. App. 915). The purported strike was illegal because it was not authorized by the international union. JRM agreed to pay the striking miners' wages. Pet. App. 5a.

JRM also financed the purchase of a large number of weapons for the strikers. After initial attempts to prevent truckers from hauling coal from the Ray-Mac mine failed, armed men, including petitioners Stumbo, Kinney, and Rowland, went into the hills overlooking the mine and fired at Ray-Mac's miners and equipment in an effort to halt production. Pet. App. 5a. When these sniping attacks proved ineffective, Jones decided to blow up Ray-Mac's equipment. On February 21, 1982, Stumbo and an accomplice placed dynamite bombs on a bulldozer and a mining auger. The auger was heavily damaged, but the other bomb failed to explode because the fuse was crimped improperly. Shortly thereafter, at Jones' instigation, petitioner Meade and others destroyed a "tipple" (a device for loading coal into rail cars) that had been leased for use at the Ray-Mac site. *Id.* at 6a.

2. The court of appeals affirmed petitioners' convictions (Pet. App. 3a-22a). The court concluded that the seating arrangements necessitated by trial of 18 defendants did not violate the Sixth Amendment because sufficient communication was permitted between petitioners and their counsel (*id.* at 20a). The court also held that the swearing of a law enforcement agent as an agent of the grand jury was not improper and did not prejudice petitioners (*id.* at 12a-14a). Finally, the court held that the district court's charge correctly instructed the jury under *United States* v. *Enmons*, 410 U.S. 396 (1973), that violence in pursuit of legitimate labor objectives does not violate the Hobbs Act, 18 U.S.C. 1951.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners "were convicted after a fair trial on the basis of overwhelming evidence" (Pet. App. 22a). Further review is unwarranted.

1. Because of the crowded courtroom conditions at trial, the 12 defense counsel were seated at an L-shaped table, while the 18 defendants were seated immediately behind the table in two rows of 9 each (see Pet. App. 47a, 53a). Petitioners' contention (Pet. 10-18) that this arrangement violated the Sixth Amendment by preventing their effective consultation with counsel is without merit.

As this Court has recently recognized, "[n]ot every restriction on counsel's time or opportunity * * * to consult with his client * * * violates a defendant's Sixth Amendment right to counsel." *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); see, *e.g.*, *United States* v. *Vasquez*, 732 F.2d 846, 848 (11th Cir. 1984). The district court has broad discretion, consistent with the Constitution, "to arrange the seating for defendants and counsel" in light of "a variety of factors," such as "the size of the courtroom, * * * the number of defendants and lawyers, * * * [and] security provisions." *United States* v. *Turkette*, 656 F.2d 5, 10 (1st Cir. 1981); see also, *e.g.*, *United States* v. *Walker*, 559 F.2d 356, 370 (5th Cir. 1977).

There was no abuse of that discretion in this case. Although petitioners were not seated at counsel table, the district court noted that they would be within "five or six feet" of their respective counsel and that they would be "close enough" to "get word to [counsel]" if they wished to confer (C.A. App. 695). And while the district court, "for security reasons," did not "want the [petitioners] up moving around the Court," it did allow counsel to walk to where their clients were seated and to confer with them freely during the trial (*ibid.*). Moreover, unlike in *Geders*

v. *United States,* 425 U.S. 80 (1976), the court did not restrict in any fashion petitioners' right to consult freely with counsel during the frequent recesses that occurred through the three months of trial. The practical necessity of accommodating the large number of defendants and counsel, as well as the security considerations arising from the trial of defendants charged with violent crimes and the introduction of large quantities of firearms and ammunition into evidence, amply justified the incidental restrictions on communication that resulted from the seating arrangement chosen by the district court.[2]

2. Petitioners argue next (Pet. 18-21) that the independence of the grand jury was compromised when a federal law enforcement officer assigned to the investigation, Dennis McAllister, was sworn as an agent of the grand jury. Although the court of appeals was willing to treat this argument as having been preserved (Pet. App. 9a-10a), we note that the claim should have been deemed

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[2] Petitioners' reliance (Pet. 14-15) on *United States* v. *Sorrentino,* 726 F.2d 876 (1st Cir. 1984), is completely misplaced. There, the court of appeals expressly upheld the district court's order seating the defendant apart from his counsel on the ground that the arrangement did not "prevent[] or unduly hinder[] communication between defendant and his counsel" (*id.* at 887). The court of appeals here reached precisely the same conclusion (Pet. App. 20a). Moreover, the court in *Sorrentino* recognized that "reasons of security or * * * practicality" are sufficient to seat a defendant apart from counsel (726 F.2d at 887). These are the same grounds supporting the seating arrangement in this case. *People* v. *Zammora,* 66 Cal. App. 2d 166, 152 P.2d 180 (1944), on which petitioners also rely (Pet. 14), is, in addition to its ancient vintage, wholly inapposite. In that case, the defendants were seated together as if in a " 'prisoners' box' " that was "in one part of the courtroom some distance away from the counsel table" (66 Cal. App. 2d at 227-228, 152 P.2d at 211), and counsel were prevented from conferring with their clients both in the courtroom and during recesses (*ibid.*). The court expressly left open the permissibility under the state constitution, which was there at issue, of circumstances like those here, where counsel are afforded free access to their clients for consultation (66 Cal. App. 2d at 234-236, 152 P.2d at 215).

waived because it was not presented in a timely fashion and petitioners advanced a different legal theory in the court of appeals from that presented to the district court. See Fed. R. Crim. P. 12(b)(1) and (2). In any event, petitioners' claim is without merit.

The "agent of the grand jury" issue is, in our view, a tempest in a teapot. While there is no compelling need to follow this practice, neither is it harmful. It is in fact a practice in a few judicial districts for federal investigative officers to be designated as "agents" of the grand jury. See, *e.g.*, *United States* v. *Cosby,* 601 F.2d 754, 757-758 n.6 (5th Cir. 1979); *United States* v. *Stanford,* 589 F.2d 285, 292 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); see also *United States* v. *Mara,* 410 U.S. 19, 20 (1973). This practice has probably evolved from the practical reality that law enforcement officers serve an important function in assisting the prosecutor to present evidence to the grand jury, including ministerial tasks on behalf of the grand jury such as serving subpoenas and accepting returns of documents. See generally S. Rep. 95-354, 95th Cong., 1st Sess. 6 (1977). As this Court has noted, the grand jury "would be much less effective without the assistance of the prosecutor's office and the investigative resources it commands" because the grand jury "depends largely on the prosecutor's office to secure the evidence or witnesses it requires." *United States* v. *Sells Engineering, Inc.,* 463 U.S. 418, 430 (1983) (footnote omitted). True, being sworn as an agent of the grand jury is not essential to the role that law enforcement officers already play; if the judges of a particular district find this purely semantic designation undesirable, they are of course free to adopt a local rule forbidding it. But as a general matter, the mere swearing of an officer as an agent of the grand jury plainly is not so inherently pernicious or impervious to correction by other means as to warrant the dismissal of an indictment.

In the instant case, it is impossible to see how agent McAllister's designation as an agent of the grand jury could have done anything to undermine its independence. In that capacity, McAllister merely served subpoenas and received custody of exhibits (see C.A. App. 822-825, 845, 847-848). He also testified briefly on two occasions, once at the outset to give an overview of the investigation and once after the indictment was drafted to review its allegations. It can scarcely be reasonably contended that McAllister's innocuous caretaking functions as the grand jury's "agent" reduced that body to a mere tool of the prosecutor. Cf. *Sells Engineering*, 463 U.S. at 429 (emphasis and footnote omitted) (government attorneys are permitted in the grand jury room because "both the grand jury's functions and their own prosecutorial duties require it").[3]

In any event, petitioners suffered absolutely no prejudice from the swearing of agent McAllister as an agent of the grand jury. They "concede[d] that McAllister properly could investigate and report back to the grand jury, as well as summarize and retain custody of the evidence, all in his capacity as case agent" (Pet. App. 12a). Moreover, they "do not contend, nor could they in view of the weight of the evidence against them, that, but for McAllister's being sworn as an 'agent of the grand jury', [they] would not have been indicted" (*id.* at 13a). Such prejudice, however, is an indispensable prerequisite to the dismissal of the indictment on the basis of the courts' supervisory powers. See *United States* v. *Hasting*, 461 U.S. 499 (1983); *United States* v. *Morrison*, 449 U.S. 361 (1981). Finally, peti-

[3] Petitioners rely (Pet. 19) primarily on opinions of two district judges who have criticized the practice of designating grand jury agents. *United States* v. *Kilpatrick*, 594 F. Supp. 1324, 1328-1331 (D. Colo. 1984); *United States* v. *Anderson*, 577 F. Supp. 223, 232-233 (D. Wyo. 1983); *United States* v. *Kilpatrick*, 575 F. Supp. 325, 327-330 (D. Colo. 1983). Our appeals in these cases have been argued and are currently pending before the Tenth Circuit.

tioners' convictions by a petit jury conclusively establish the existence of probable cause to prosecute. The defect that they assert in the grand jury proceeding is no ground for conferring on petitioners the windfall of a reversal of their convictions obtained following a three-month trial. See, *e.g.*, *United States* v. *Thibadeau*, 671 F.2d 75, 77-78 (2d Cir. 1982); *United States* v. *Brien*, 617 F.2d 299, 313 (1st Cir.), cert. denied, 446 U.S. 919 (1980).[4]

3. Last, petitioners argue (Pet. 21-26) that the district court's instructions were inconsistent with *United States* v. *Enmons*, 410 U.S. 396 (1973), where the Court held that acts of violence committed by union members in support of lawful collective bargaining demands for higher wages are immune from prosecution under the Hobbs Act. There is good reason to doubt that petitioners were entitled to an *Enmons* instruction,[5] in which event any error in the

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[4] As in *United States* v. *Griffith*, 756 F.2d 1244 (6th Cir. 1985), cert. denied, No. 84-6876 (Oct. 7, 1985), there is no need to hold this petition pending the Court's decision in *United States* v. *Mechanik*, cert. granted, No. 84-1640 (June 17, 1985). *Mechanik* presents the question whether a violation of Fed. R. Crim. P. 6(d) may be grounds for dismissal of an indictment in the absence of prejudice. The court of appeals in that case relied heavily on the language and purpose of Rule 6(d), which limits who may be present before the grand jury, in fashioning its rule of per se dismissal (see 735 F.2d 136, 139 (4th Cir. 1984)). Whatever the merits of the court's reasoning with respect to Rule 6(d), it has no application here, where no violation of that Rule is claimed. As the cases cited in text make clear, the general rule is that prejudice must be shown to warrant dismissal of the indictment. *Mechanik* presents the question whether violations of Rule 6(d) should be treated as an exception to that rule.

[5] The courts of appeals have consistently refused to extend the labor exemption beyond the labor-management relations context presented in *Enmons*, and this Court has consistently denied review where it has been sought. See, *e.g.*, *United States* v. *Clemente*, 640 F.2d 1069, 1076-1078 (2d Cir.), cert. denied, 454 U.S. 820 (1981); *United States* v. *French*, 628 F.2d 1069, 1074-1075 (8th Cir.), cert. denied, 449 U.S.

instruction would not have been prejudicial and could not justify reversal of their convictions. But in any event the district court's instructions, viewed in their entirety (*e.g., Cupp* v. *Naughten,* 414 U.S. 141, 146-147 (1973)), correctly presented the *Enmons* defense—that petitioners' acts of violence occurred in furtherance of legitimate union organizing activity at Ray-Mac—to the jury.

As the court of appeals observed, the charge was "carefully structured * * * [in] two parts[:]" the first part "assume[d] that [petitioners] acted in pursuit of legitimate union objectives" while the second "assumed a finding of improper purpose behind the acts of violence" (Pet. App. 18a). Under *Enmons,* the district court stated first, "a legitimate labor activity in a labor dispute in support of a proper labor objective cannot constitute extortion, * * * notwithstanding violence and threats may have occurred in support of such proper union objective" (*id.* at 64a). The court further stated that "organizing the employees of a business" was a "proper union objective within the *Enmons* exception" (*ibid.*). Moreover, the court made clear that "violence and threats" that "honestly occur[red] as a by-product of a legitimate labor activity" were beyond the reach of the Hobbs Act (*ibid.*). In the second part of its instruction, the court stated that *Enmons* did not provide a defense to extortionate activities committed during

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956 (1980); *United States* v. *Cerilli,* 603 F.2d 415, 419-420 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Quinn,* 514 F.2d 1250, 1256-1259 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976). Here, unlike in *Enmons,* the violence was not committed in a collective bargaining context or against the strikers' own employer, and petitioners' conduct was at the very least arguably unlawful under the federal labor statutes. The *Enmons* labor exemption has no application in such a context. See, *e.g., United States* v. *Wilford,* 710 F.2d 439, 444 (8th Cir. 1983), cert. denied, 464 U.S. 1039 (1984). For these reasons, the district court "came very close" (C.A. App. 1838, 1839) to omitting a charge on the *Enmons* defense and gave one only out of an abundance of caution.

"mere pretext[ual] [or] feigned" labor disputes or for the purpose of "wrongfully depriv[ing] or deny[ing] the right to do business and legitimately compete with another" (Pet. App. 66a). The court also made it clear that it was the government's burden to establish beyond a reasonable doubt that petitioners' activities did not come within the exemption (*id.* at 64a).

In the face of this comprehensive and correct statement of the law, petitioners rely only on isolated portions of the charge taken out of context to support their claim of error.[6] For example, petitioners contend (Pet. 23) that the court's statement that "use of firearms 'to coerce and prevent employees from working is not a legitimate labor activity within the *Enmons* exception' " was erroneous. As they did in the court of appeals (see Pet. App. 19a), however, petitioners ignore the immediately preceding portion of the instruction, which makes clear that the district court was speaking only of the use of firearms outside the context of a legitimate labor activity (*id.* at 66a).

Similarly, petitioners fault (Pet. 24) the district court for instructing the jury that labor activities not authorized by the UMWA were not within the *Enmons* exemption. Petitioners' undisputed failure to follow the binding obligations imposed by the union's constitution, however, plainly placed them outside of the exemption. See, *e.g.*, *United States* v. *Cusmano,* 729 F.2d 380 (6th Cir. 1984), cert.

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[6] Petitioners also point (Pet. 23-24) to changes suggested by the government during the Rule 30 conference. These changes were offered at a time when the court's proposed instructions incorrectly defined the term "wrongful" (see C.A. App. 1815, 1832-1833, 1851-1852, 1883-1884). After the conference, the court changed its definition of wrongfulness (see *id.* at 1898) to comport with *Enmons* by accepting the government's proposed definition (see *id.* at 1994), thereby eliminating the basis for many of the government's suggestions concerning other aspects of the instructions.

denied, No. 83-1719 (June 18, 1984).[7] Finally, petitioners rely (Pet. 24) on the district court's instruction that " '[a] legitimate act wrongfully performed may become unlawful and outside the protection of the *Enmons* exception.' " Even if this single statement (which, properly understood, required simply that the alleged violence be connected with a legitimate labor dispute to come within *Enmons*) was "somewhat confusing" (Pet. App. 19a), it did not materially detract from the charge as a whole. That charge "more than adequately focused the jury's collective mind on the distinction in *Enmons* between wrongful ends and wrongful means" (*ibid.*). Nothing more was required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ROBERT J. ERICKSON
Attorney

NOVEMBER 1985

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[7] Petitioners' contention (Pet. 24) that the instruction allowed the government to regulate wildcat strikes is unfounded because there was no wildcat strike in this case. Ray-Mac's employees, who were not unionized, did not go out on strike, and the employees of JRM's affiliates did so only at the request of their employers, not as a result of a labor dispute with them.